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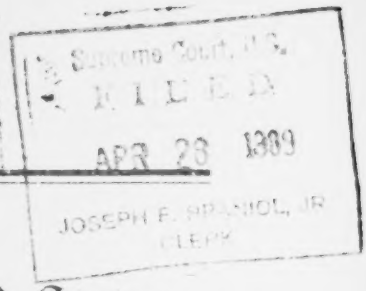

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

L. STEVEN PLATT,
Petitioner,

v.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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April 1989

QUESTIONS PRESENTED*

1. May Rule 11 of the Federal Rules of Civil Procedure be used to impose sanctions on a lawyer for work done in the courts of appeals, on the theory that it is incorporated into Rule 46 of the Federal Rules of Appellate Procedure?

2. May a court of appeals discipline a lawyer under Rule 46 of the Federal Rules of Appellate Procedure, without first giving the lawyer notice and an opportunity to show cause and to request a hearing, on the theory either that a hearing would not have mattered or that a request for sanctions under Rule 38 in the opposing party's brief and the opportunity to present oral argument on the merits satisfy those requirements?

3. May a court of appeals impose costs and penalties against a lawyer under Rule 38 of the Federal Rules of Appellate Procedure, on the ground that the appeal was "frivolous," solely because the lawyer had repeated arguments which he had made in the district court and which the court of appeals found had been properly rejected?

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* Petitioner was counsel for the plaintiff-appellant below. The United States Court of Appeals for the Seventh Circuit is listed as a respondent in the caption because one part of the judgment of which petitioner seeks review imposed a fine on him that was paid to the court itself by a check to the United States Treasury. In addition, the Chicago Sun-Times and the Graphic Communications Union, Chicago Paper Handlers and Electrotypers Local No. 2 were defendants-appellees below and are respondents in this Court, because petitioner also seeks review of an award of costs to be paid personally by him to them. Ronald Mays was the plaintiff-appellant below and may be deemed a respondent under Rule 20.6. Review is not sought of the underlying judgment in favor of appellees and against the appellant below.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

L. Steven Platt, Esquire, petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The unreported decision of the district court is set forth at pages 15a to 22a of the appendix to this petition. (App. 15a–22a). An unreported opinion and order denying reconsideration is set forth at App. 23a-24a. The original decision of the court of appeals is reprinted at App. 1a-12a. A correction to the opinion of the court of appeals was issued on February 24, 1989, and is reprinted at App. 13a-14a. The reported decision of the court of appeals, as corrected, appears at 865 F.2d 134.

JURISDICTION

The judgment of the court of appeals was issued on January 4, 1989. App. 25a. Rehearing was denied on February 7, 1989. App. 26a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 1 of the Federal Rules of Civil Procedure provides as follows:

> **Scope of Rules**
>
> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 11 of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> **Signing of Pleadings, Motions and Other Papers; Sanctions**
>
> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the

> extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 38 of the Federal Rules of Appellate Procedure provides as follows:

> **Damages for Delay**
>
> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Rule 46 of the Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

* * * *

> **(c) Disciplinary Power of the Court over Attorneys.** A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

STATEMENT

This action began when Ronald Mays, the plaintiff and appellant below, filed a hand-written, *pro se* complaint in the Circuit Court of Cook County, Illinois, on May 1, 1986. Plaintiff charged that both respondent Chicago Sun-Times and respondent Chicago Paper Handlers Union ("Union") had discriminated against him on account of his race in his efforts to switch from part-time to full-time employment as a paper handler with the Sun-Times, and that respondent Union had violated its duty of fair representation. Respondents removed the case to the United States District Court for the Northern District of Illinois on the authority of 28 U.S.C. § 1441, because the claims arose under federal law, 42 U.S.C. §§ 1981, 2000e–3; 29 U.S.C. § 159, and thus were within the district court's original jurisdiction. 28 U.S.C. §§ 1331, 1337; 42 U.S.C. § 2000e–6(f)(3). Respondents Union and Sun-Times took the deposition of plaintiff Mays (who was still not represented by counsel), and then moved for summary judgment.

At this point, Mays was referred to petitioner L. Steven Platt, Esquire. Platt agreed to represent Mays and filed an opposition to the motion for summary judgment that was accompanied by affidavits from two former Sun-Times paper handlers, Lylbum French, a black employee who swore that he had encountered a variety of incidents of racial discrimination during his employment, and Robert Myers, the assistant chairman of the Union's shop committee, who swore that the Union was involved in hiring decisions and that Sun-Times management had retaliated against him for protesting racial discrimination in the workplace. The affidavits supported various aspects of Mays' deposition testimony that tended to suggest that, although respondent Sun-Times had claimed that Mays was not hired because he lacked previous experience as a "lift truck" driver, the defense was a pretext because most persons hired as full-time paper handlers

obtained their training as lift truck drivers on the job.

Respondents deposed Myers and French, and, based on these depositions, filed a reply to Mays' opposition to the motion for summary judgment. Petitioner then moved the district court for leave to file a surreply brief in order to point out portions of the Myers and French depositions that revealed genuine disputes about material facts, but leave was denied, and respondents' motions for summary judgment were granted. The district court concluded that the affidavits supporting Mays were too conclusory and general to create genuine issues of fact, and that the depositions had shown that several statements in the affidavits were not based on personal knowledge. App. 19a-22a.[1]

Petitioner then filed an appeal on behalf of plaintiff Mays. In his brief, petitioner pointed to several of the deposition excerpts that he had tried to call to the attention of the district court. Petitioner argued that, in disregarding certain portions of the testimony of Mays, Myers, and French, the district court had resolved credibility questions and had failed to follow the fundamental rule that, on a motion for summary judgment, the courts must draw all reasonable inferences in favor of the nonmoving party in deciding whether there are any genuine issues of material fact. Petitioner's brief in the court of appeals thus made all the arguments that he tried to make in his rejected surreply brief, as well as others concerning what petitioner argued was the district court's misapplication of the summary judgment standard.

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[1]In the Northern District of Illinois, as in many districts today, leave must be sought before an attorney may file any briefs following an opening brief, opposition and reply, and judges are often reluctant to grant such leave. Unfortunately, the effect of that rule here was that petitioner had no opportunity to discuss the testimony in the depositions, which were taken after he entered his appearance in the case and after he filed his opposition to summary judgment.

In their briefs, respondents Union and Sun-Times argued that the district court had properly found that there were no genuine issues of material fact, and had properly rejected many of the affiants' sworn statements because they were either contradicted by the depositions, or shown by various statements in the depositions not to have been based on personal knowledge. Respondent Sun-Times also argued that petitioner's brief had misstated the record in a number of respects. Finally, respondent Union objected, at 9 n.4, to what it characterized as a "scurrilous" miscitation of a court of appeals opinion also involving that Union, and asked the court to assess sanctions against petitioner under Rule 38, F.R. App. P., and 28 U.S.C. § 1912. Respondent Union returned to this theme in its conclusion, arguing that misrepresentations and "scurrilous" statements in petitioner's brief showed the appeal to be frivolous and thus worthy of sanctions under Rule 38 and 28 U.S.C. § 1912. Br. at 13.

The court of appeals affirmed the judgment of the district court. In an opinion written by Judge Flaum and joined by Judges Easterbrook and Coffey, the court concluded that some of the affiants' statements were irrelevant as a matter of law, that the affiants had in fact lacked sufficient personal experience to support some parts of their testimony, that affiants' inability to remember certain specifics would preclude a reasonable jury from relying on other parts of their testimony, and that the inferences that Mays had asked to be drawn from the affidavits and deposition testimony were not reasonable. App. 3a-7a.

The court then proceeded to consider respondent union's request for sanctions under Rule 38 and 28 U.S.C. § 1912. The court invoked the standard for imposing costs and penalties that had previously been established in the Seventh Circuit: an appeal is "frivolous" under Rule 38, and hence is the basis for sanctions, "when the appellant merely restates arguments that the district court properly rejected." App. 8a. Because the court of appeals concluded that the district court had considered and

properly rejected the argument that the Myers and French affidavits sufficed to defeat summary judgment, and because the court of appeals was of the view that this was "essentially" all that Mays had argued on appeal, the court ruled that the appeal was frivolous under Rule 38. *Id.*

Having concluded that the appeal was frivolous, the court went on to rule that sanctions were appropriate against petitioner because the district court's opinion had provided a "cogent" and "incisive" explanation of the inadequacy of the affidavits. Accordingly, the court concluded that petitioner could not have had a reasonable expectation that his arguments would prevail on appeal, and it ordered petitioner, rather than his client who would ordinarily have borne appellees' costs, to pay the costs personally. App. 9a.

Next, the court of appeals raised *sua sponte* the issue, which had not previously been mentioned either in the briefs or at oral argument, of whether certain statements in Mays' brief violated Rule 11 of the Federal Rules of Civil Procedure. App. 9a-12a. The court acknowledged that Rule 11 is not part of the Federal Rules of Appellate Procedure, nor even of the Seventh Circuit's own local rules, but it again invoked a previous holding that Rule 46 of the Federal Rules of Appellate Procedure "authorizes this court to impose sanctions on an attorney whose conduct violates Rule 11." App. 10a. The court acknowledged that Rule 46 requires a court of appeals to provide "reasonable notice," an "opportunity to show cause to the contrary," and a "hearing if requested," but invoked still another ruling of the court that deemed such procedural protections unnecessary if the court were confident that they "would not assist the court." App. 10a n.3.

Having disposed of the need for procedural protections, the court went on to find three Rule 11 violations in petitioner's brief. First, it concluded that, as suggested by the Union, petitioner had misstated a case on which he relied. App. 11a. Second,

it found fault with petitioner's statement, introducing a paragraph that cited that case and discussed certain statistics, that "no one disputes that [respondents] have a dismal record of hiring and employing minorities . . .," because both respondents had strongly objected to the characterization of their record as dismal. *Id.* Third, it criticized petitioner for including in his brief a statement which it quoted as follows: "Lylbum French was fired after filing a race discrimination charge *against the Sun-Times*," (emphasis added), which the court considered was contradicted by French's deposition testimony that he filed a charge against the Sun-Times *after* he was fired.[2] Based on these findings, the court ruled that Platt had made "several statements that are not well-grounded in fact or law" and, pursuant to Rule 46(c), ordered Platt to pay a $1000 fine to the United States Treasury.

Platt sought rehearing and rehearing en banc, which were denied on February 7, 1989. However, on February 24, 1989, the court modified its opinion, deleting its explanation that no hearing was required under Rule 46 because a hearing would not help the court. Instead, the court explained that a hearing was not required because (1) the union's brief had asked for sanctions (albeit under Rule 38), thus giving petitioner adequate notice of potential disciplinary action, (2) petitioner had been questioned at oral argument about some of the statements in his brief, and (3) petitioner had not requested a hearing on possible sanctions. App. 13a-14a.

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[2]In fact, the court of appeals misquoted petitioner's brief, which simply stated that French was fired "after filing a race discrimination charge." Br. at 5. The difference is significant because French's affidavit said that he was fired after filing such a charge against the *Union*, but in his deposition he was asked only when he filed a certain charge against the Sun-Times.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals Concerning the Standards and Procedures for Punishing Lawyers for Their Appellate Advocacy Conflicts With the Decisions of Other Circuits, Presents an Important Question of Federal Law, and Is Chilling Advocacy Within the Circuit.

1. The courts of appeals have ample authority to impose sanctions or damages where they are warranted because an appeal is frivolous, Appellate Rule 38, where the prevailing party is damaged by the delay in resolution of the case, 28 U.S.C. § 1912, where an attorney "multiplies the proceedings . . . unreasonably and vexatiously," 28 U.S.C. § 1927, or where a party or attorney has proceeded in bad faith. *Roadway Express v. Piper*, 447 U.S. 752 (1980). In 1983, Civil Rule 11 was amended to hold lawyers to a higher standard with respect to papers filed in the district courts. Under the amendment, a lawyer may be sanctioned for making statements that are not based on a belief, formed after reasonable inquiry, that they are well grounded in fact and warranted by existing law or a good faith argument about the law. This change was adopted after a lengthy debate; indeed, the debate continues about whether amended Rule 11 is accomplishing its purposes, whether it is chilling advocacy on behalf of those who cannot afford to pay three-figure hourly rates in order to have their day in court, and whether it is creating additional litigation burdens and encouraging aggressive litigation tactics to the detriment of the just, speedy and inexpensive determination of actions, as required by Civil Rule 1.

By their own terms, the Federal Rules of Civil Procedure apply only to proceedings in the district courts, Rule 1. For this reason, the *en banc* Tenth Circuit, together with the Sixth Circuit, have held that Rule 11 does not apply to papers filed in the courts of

appeals. *Braley v. Campbell*, 832 F.2d 1504, 1510 n.4 (10th Cir. 1987) (*en banc*); *Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988).[3] The Ninth Circuit, on the other hand, has joined the Seventh Circuit in holding that Rule 11 standards are incorporated into appellate courts' disciplinary powers under Appellate Rule 46. *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (1988) (imposing six-month suspension from practice), *modified*, 850 F. 2d 597 (1988).[4]

Appellate Rule 46 provides that lawyers may be disciplined for violating the appellate rules or the local rules, or for "conduct unbecoming a member of the bar of the court." The court below did not state that a lawyer who violates the standards of Rule 11 violates a "rule" of the court; instead, its position, taken in an earlier case and reaffirmed in this one, is that Rule 11 defines conduct "unbecoming a member of the bar." *See In re Kelly*, 808 F.2d 549, 551 (7th Cir. 1986); App. 10a. But district courts, too, have the power to discipline lawyers for unbecoming conduct, *see Ex parte Burr*, 22 U.S. (9 Wheat.) 529 (1824), and if the district courts' inherent disciplinary powers over lawyers practicing before them already gave them the authority to discipline lawyers for making inaccurate statements about legal or factual matters, then it was wholly unnecessary to amend Rule 11 in 1983. There is common agreement that the Rule 11 amendments represent a substantial extension of the district courts' power to

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[3]Several courts of appeals have also held that Rule 11 does not apply to papers filed in state courts prior to removal to the district court. *E.g.*, *Hurd v. Ralphs Grocery Co.*, 824 F.2d 806, 808 (9th Cir. 1987) (collecting cases).

[4]One other court has imposed Rule 11 sanctions for conduct on appeal, but only after first finding that the appeal was "utterly frivolous" and "vexatious," which would have warranted sanctions under Rule 38 or even 28 U.S.C. § 1927. However, for reasons explained in its opinion, the court declined to invoke Rule 38 and instead opted to rest on Rule 11. *United States v. Carley*, 783 F.2d 341, 344 (2d Cir. 1986).

sanction attorneys. Therefore, the court of appeals erred in assuming such power for itself without first obtaining a change in the Appellate Rules. In any event, the clear division of authority about whether the courts of appeals may impose discipline under Rule 11 standards needs to be resolved by this Court.

2. Even assuming that Civil Rule 11 applies through Appellate Rule 46, the Seventh Circuit stands alone in its position that discipline may be imposed on a lawyer without first giving the lawyer notice, *from the court*, that Rule 46 sanctions are being considered, and giving him an "opportunity to show cause to the contrary" and to request a hearing if one is desired, as provided by Rule 46(c). Every Rule 46 proceeding that we have examined from every other court of appeals has followed this procedure, and there is no reason why the Seventh Circuit should not do the same.[5] Indeed, the consensus among the courts of appeals concerning the application of Rule 11 itself, which unlike Rule 46 does not contain specific language on the procedures to be followed, is that, although sanctions may be imposed on a district court's own initiative, the lawyer involved should first be given notice and an opportunity to respond. Most courts also provide for a hearing (although not necessarily an evidentiary hearing) on Rule 11 questions. Willging, *The Rule 11 Sanctioning Process* 83–105 (Federal Judicial Center 1988) ("*Federal Judicial*

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[5]*E.g.*, *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir. 1988); *Matter of Snyder*, 734 F.2d 334, 336 (8th Cir. 1984), *rev'd*, 472 U.S. 634 (1985); *Office of Disciplinary Counsel v. Pileggi*, 570 F.2d 480, 481 (3d Cir. 1978); *In re Bithoney*, 486 F.2d 319, 320 (1st Cir. 1973). *See generally In re Ruffalo*, 390 U.S. 544 (1970) (court of appeals could not impose discipline based on charges to which petitioner did not have an opportunity to respond); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1874) (lawyer must receive a citation, and hearing or opportunity of being heard, before being disciplined by a federal court).

Center Study").[6]

Neither of the justifications given by the court below for its refusal to give notice or an opportunity to show cause has merit. In its initial opinion, the court held that a hearing was unnecessary because it was confident that a hearing would not "assist the court," a rationalization previously given by that court for avoiding the burden of notice and hearings before sanctioning attorneys. *E.g., Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, 1201 (7th Cir. 1987). Wholly aside from the fact that the purpose of according due process protections is to assist the person whose rights are endangered, not to assist the court, only by giving notice and an opportunity to be heard can a decision-maker be sure that it has weighed all the relevant considerations. The point was made cogently by the dissenting judge in *Hill*:

> The unmonitored act of assessing sanctions against a lawyer can too easily beget emotion. It is a common human tendency to find self assurance in anger when punishing, and that drive for self assurance itself tends to enhance the level of the punishment. In the performance of the judicial function, a court like any other person in authority too easily can lose sight of its otherwise dispassionate review of the

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[6] *E.g., Tom Growney Equip. v. Shelley Irrig. Devel.*, 834 F.2d 833, 835–836 (9th Cir. 1987); *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987) (*en banc*). *See also Roadway Express v. Piper*, 447 U.S. 752, 767 (1980) ("Like other sanctions, attorney's fees certainly should not be assessed . . . without fair notice and an opportunity for a hearing on the record."); *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1073 (1985) (before deciding whether to impose sanctions for frivolous appeal under Rule 49.2, this Court gave petitioner an opportunity to respond); *Eash v. Riggins Trucking*, 757 F.2d 557, 570 (3d Cir. 1985) (*en banc*) (procedure for fine imposed under inherent power); *Braley v. Campbell*, 832 F.2d 1504, 1514–1515 (10th Cir. 1987) (*en banc*) (procedure for Rule 38 sanctions).

facts and the law when it considers without a prior exchange of reasoning an assessment of sanctions.

Id. at 1203.[7]

Subsequently, the court changed the footnote in which it explained why it did not have to give petitioner notice and an opportunity to show cause. Thus, it deleted the not necessary to "assist the court" rationale, and substituted a rationale based on the assertion that the request for Rule 38 sanctions in respondent Union's brief was all the notice and opportunity that was required. However, there are several reasons why this new justification also cannot stand.

First, the standard for Rule 38 sanctions — the appeal must have been frivolous — is very different from Rule 11. One may have a strong case, indeed a winning case, and still make false statements that warrant sanctions under Rule 11. Rule 38, by contrast, provides for sanctions based on the overall strength of the appeal. Indeed, although the Union suggested that misrepresentations were evidence of a frivolous appeal under Rule 38, it did not argue that mere misrepresentations could be grounds for punishment under that Rule. An attorney faced with a Rule 38

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[7]The facts of this case demonstrate the errors that can be committed when a court rushes to judgment on sanctions. For example, had the lower court given notice, we assume that it would have recognized that one of the statements for which petitioner was sanctioned — concerning the timing of French's discharge vis-a-vis his discrimination charge — was not at all incorrect, and that the source of the problem was that the court itself had misquoted petitioner's brief. It might also have understood the proper context for another of the statements, concerning the lack of dispute about whether the defendants had a dismal record, and recognized that the word "dismal" was intended as a characterization of undisputed statistics, not as a statement that defendants agreed that "dismal" was a proper characterization.

claim might well couch his arguments against sanctions very differently than if he or she were charged with liability for having made specific misrepresentations. He might even be so confident that an appeal is not frivolous as a whole that, as in this case, he might choose not to address the question directly. That is particularly true because, although the stigma of being assessed sanctions for a frivolous appeal may be more significant to a lawyer than the money involved, Rule 38 sanctions often require an attorney to pay only single or double costs which consists essentially of the cost of duplicating the appellee's brief. After making judgments based on considerations such as these about whether and how to defend his own conduct, while simultaneously pressing his client's appeal, the attorney should not be subjected to Rule 46 discipline on the assumption that he has had his chance to respond.

Nor did the fact that the panel asked petitioner about particular statements in his brief at oral argument constitute a sufficient notice, "opportunity to show cause," or opportunity to request a hearing. Neither the panel nor anybody else warned petitioner that Rule 46 discipline or Rule 11 sanctions were being considered against him personally, and in any event two of the statements for which he was sanctioned — the "undisputed dismal record" and the "fired after discrimination charge" — were not raised at oral argument.[8]

Indeed, if the "notice" that the Seventh Circuit upheld was sufficient for imposing a fine under Appellate Rule 46(c), it

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[8]According to a tape recording of the oral argument which has been obtained from the court of appeals, the statements on which petitioner was questioned included the citation of the other Seventh Circuit case and two other statements about whose accuracy the court seems to have been satisfied, inasmuch as they were not mentioned in its opinion. Indeed, there was no mention of any possible sanctions, except under Rule 38, at the oral argument. If review is granted, the relevant portion of the argument will be transcribed and a copy of the transcript included in the Joint Appendix.

would also be sufficient for suspension or disbarment under Appellate Rule 46(b), which contains the same procedural requirements as Rule 46(c). It is unimaginable that an attorney could be disbarred based simply on an adversary's request for Rule 38 monetary sanctions for a frivolous appeal, yet that is the logic of the ruling below. We submit that, in its concern for efficiency in imposing punishment, the Seventh Circuit has discarded the procedural protections of Rule 46(c) that are followed everywhere else, and that, therefore, review by this Court is necessary to secure those protections for lawyers in the Seventh Circuit whose appellate advocacy is challenged.

3. The decision below also warrants review because of the standard applied by the court in deciding that petitioner had filed a frivolous appeal that warranted an award of costs under Appellate Rule 38. According to that court, the appeal was frivolous because petitioner had advanced an argument that had been "considered and, in our view, properly rejected by the district court." App. 8a. Although it is not easy to enunciate a formula for determining when an appeal is "frivolous," the court of appeals' view is plainly incorrect. Other courts of appeals have used a variety of descriptions for those appeals that warrant Rule 38 sanctions, but generally they have been careful to state that it is not enough that an appeal be based on incorrect or meritless argument. *E.g., Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154, 1161 (6th Cir. 1985) ("appeal is meritless [but not] so unreasonable or unjustified as to cause us to impose sanctions"); *Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 748 F.2d 118, 124 (2d Cir. 1984) (appellant was wrong, but appeal was not "absolutely without merit," "farfetched," or "simply a calculated delay"); *Campbell v. Teledyne Movible Offshore*, 714 F.2d 429, 431 (5th Cir. 1983) (although "chances of success on this appeal were slim, indeed very slim," appeal was not " 'patently' frivolous [citation omitted], or without any 'reasonable basis' [citation omitted], or 'supported only by bravado' ").

Absent a stringent standard for finding appeals to have been frivolous, there is a grave danger that parties could be deterred from exercising their right to appeal. Indeed, that chilling effect, coupled with the symbolism of cutting off access to the courts, was one of the reasons given by four Justices for refusing to impose a fine for an assertedly frivolous appeal to this Court, under the authority of Supreme Court Rule 49.2, which like Appellate Rule 38 authorizes damages for frivolous appeals and petitions. *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1070-1071 (1985). Even those Justices who would have imposed a $1000 fine in *Talamini* agreed that sanctions should be reserved for "egregious cases." *Id* at 1073. Yet the standard used by the court below was not confined to egregious cases, and it could easily apply to most appeals in which the judgment below is affirmed.

Nor was the application of the standard used to determine whether the appeal was frivolous rendered harmless by the fact that the court of appeals based its decision to actually impose sanctions on its conclusion that, "[g]iven the incisive nature of the district court's opinion, [petitioner] could not have had a reasonable expectation that the same arguments would prevail in this court...." Appellants often secure reversals of district courts by presenting "the same arguments" that the district judge regarded as unpersuasive. Indeed if "the same argument" has not been advanced below, there is always a question about whether it has been preserved for appeal, and yet the opinion below suggests that a lawyer who raises on appeal arguments that have been explicitly advanced and rejected below does so at his personal peril. But nothing in Rule 38 suggests that a party or his lawyer should be faced with the possibility of sanctions simply because of a fear that the district judge's evaluation of the arguments rejected below may also be shared by the court of appeals.

Indeed, the "reasonable expectation" language used by the

lower court closely resembles the "reasonable inquiry" standard that applies to district courts under Rule 11. Yet it is clear that Rule 11 was intended to create liability for more than simply unsuccessful lawsuits. *See Morristown Daily Record v. Graphic Comm. Union*, 832 F.2d 31, 32 n.1 (3d Cir. 1987) (Weis, J.). Because it was necessary to amend the Federal Rules of Civil Procedure to provide for sanctions for lawsuits that do not meet a "reasonableness" standard, it was error for the court of appeals to impose such a standard without a comparable amendment to the Appellate Rules. The standard should not be adopted through the back door by expanding a rule which by its own terms applies only when the appeal is "frivolous."[9]

4. The sanctions imposed by the court below are not an isolated instance. To the contrary, the Seventh Circuit's expansive standards for the imposition of Rule 38 sanctions and Rule 46 discipline has made it by far the most dangerous appellate court in the country for lawyers. Thus, since January 1, 1986, the Seventh Circuit has imposed sanctions under Rules 38 and 46, and 28 U.S.C. § 1927, in 37 reported cases, more than in any other circuit; our review of the reported cases shows that only two circuits even come close to that many sanctions issued in this time period (the Fifth Circuit in 24 and the Ninth Circuit in 22),

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[9]The court of appeals' apparent equation of Rule 38 with Rule 11 is further shown by its adoption of the rule, rejected in other circuits, that even if an appeal raises colorable arguments, Rule 38 sanctions may be imposed for aspects of the appeal that are frivolous. *Compare Hill v. Norfolk & Western, supra*, 814 F.2d 1192, 1200 (7th Cir. 1987) (sanctions appropriate although one out of four arguments was colorable), *and Cheek v. Doe*, 828 F.2d 395, 397-398 (7th Cir. 1987) (sanction imposed for frivolous appeal even though appellant obtained reversal in part because amount of sanctions imposed below was abuse of discretion), *with Bulgo v. Munoz*, 853 F.2d 710, 718 (9th Cir. 1988) (one colorable argument suffices to defeat request for sanctions), *and Sauers v. Commissioner of Internal Revenue*, 771 F.2d 64, 70 n.9 (3d Cir. 1985) (same).

and both of those circuits handle twice as many appeals as the Seventh Circuit.[10]

Moreover, the Seventh Circuit has gone out of its way to threaten lawyers that rules allowing sanctions "are being and will continue to be enforced in this circuit to the hilt — as a recital of opinions published by this court since [January 1, 1986] should make clear.... Lawyers practicing in the Seventh Circuit, take heed!" *Dreis & Krump Mfg. v. Machinists*, 802 F.2d 247, 255-256 (7th Cir. 1986); *Reis v. Morrison*, 807 F.2d 112, 113 (7th Cir. 1986) (opinion published "to make this point unmistakably clear to lawyers and litigants in this circuit"); *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, 1203 (7th Cir. 1987) ("again we remind the bar that [if an appeal] is frivolous in whole or in part this court will impose sanctions . . . [W]e have said repeatedly that we would punish such tactics, and we mean it . . . [T]he members of the bar still do not realize that the judicial attitude toward attorney misconduct has stiffened. They had better realize it"). *See also Weinstein v. University of Illinois*, 811 F.2d 1091, 1098 (7th Cir. 1987) (sanctions awarded *sua sponte* to protect judges of the court of appeals, among others, from having to waste their time "sifting through the claims of people who neglected to do their own legal research"; award advances the court's own "interest in the orderly conduct of business"). The Seventh Circuit seems to have embarked on a program to teach better advocacy to the lawyers practicing before it, using sanctions as the stick.

There is little question that many lawyers could improve their advocacy, but the danger is that the crusade to change the practice of law could have the effect of chilling representation, particularly on the part of those lawyers who typically represent

[10]Caseload figures are drawn from Administrative Office of the U.S. Courts, *Federal Court Management Statistics* 12, 16, 20 (1988).

poor, minority, and employee plaintiffs. There are two reasons why the chilling effect is especially great for such lawyers. First, sanctions tend to be visited on lawyers representing plaintiffs rather than defendants. For example, a published study of Rule 38 sanctions in the Seventh Circuit showed that, during calendar years 1986 and 1987, sanctions were imposed on plaintiffs' counsel 17 times (out of 22 cases in which the issue of plaintiff sanctions was considered, or 77% of the time) and on defendants' counsel 4 times (out of 11 cases in which the issue of defendant sanctions was considered, or 36% of the time). Chicago Council of Lawyers, *Council News* 11 (March 1988). We have not seen any similar studies of appellate sanctions at the national level, although the study is consistent with the finding that plaintiffs, and particularly civil rights plaintiffs, have borne the brunt of Rule 11 sanctions. *See Vairo, Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-201 (1988); *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11*, (forthcoming, May 1989), *reported in* National L.J., April 24, 1989, at 31.[11]

Second, it is the lawyers who represent clients who cannot afford to pay by the hour who are most chilled by the financial aspect of sanctions (although the stigmatizing effect applies to all lawyers equally). The reason for this is that lawyers who take cases on a contingent basis cannot write off the risk of having to pay money in sanctions against a substantial retainer or against bills based on substantial hourly rates that private practitioners in large law firms commonly receive. *See Federal Judicial Center Study*, at 106.

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[11]Although Rule 38 by its terms applies only to appellants, the Seventh Circuit recently warned that it will impose sanctions against counsel for appellees as well as appellants who fail to raise jurisdictional issues that the Court believes should have been discussed. *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1309 (7th Cir. 1988).

This Court has noted the potentially devastating effect of allowing sanctions to be too easily awarded against the lawyers who represent plaintiffs in employment discrimination cases. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-422 (1978), the Court warned that sanctions without a finding that the suit was "frivolous, unreasonable or without foundation . . . would substantially add to the [plaintiff's] risk inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Accord Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980).

The opinion below will send a strong message of deterrence to lawyers who might have been inclined to assist civil rights plaintiffs, particularly when considering whether to represent a *pro se* civil rights plaintiff who has been attempting to litigate the case on his own against well-represented defendants. The Court should grant review in this case to bring the Seventh Circuit back in line with the other circuits and with the decisions of this Court, so that sanctions and discipline are meted out against counsel only in the most egregious circumstances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1989

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-3083

RONALD MAYS,

Plaintiff-Appellant,

v.

CHICAGO SUN-TIMES and GRAPHIC COMMUNICATIONS UNION, CHICAGO PAPER HANDLERS' & ELECTROTYPERS' LOCAL No. 2, AFL-CIO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 4945—**Frank J. McGarr**, *Judge.*

ARGUED SEPTEMBER 15, 1988—DECIDED JANUARY 4, 1989

Before COFFEY, FLAUM and EASTERBROOK, *Circuit Judges.*

FLAUM, *Circuit Judge.* Plaintiff-appellant Ronald Mays appeals from the district court's grant of summary judgment in favor of defendants-appellees, the Chicago Sun-Times ("Sun-Times") and the Graphic Communications Union, Chicago Paper Handlers' & Electrotypers' Local No. 2, AFL-CIO ("Union"). We affirm the district court's decision in all respects, and, pursuant to Rule 38 of the

Federal Rules of Appellate Procedure, assess the costs of this appeal against appellant's attorney. In addition, pursuant to Rule 46(c) of the Federal Rules of Appellate Procedure we fine appellant's attorney $1000 for filing a brief with this court containing statements not well grounded in fact or law.

I.

The Chicago Sun-Times publishes a daily metropolitan newspaper. Like most large-scale enterprises, publishing and circulating a metropolitan newspaper depends upon the performance of hundreds of anonymous but essential tasks. One such anonymous but essential task is paper handling. Paper handling involves, *inter alia*, stripping wrapping off paper rolls, loading the rolls onto dollies and operating a conveyer belt that moves the dollies around the pressroom.

Sun-Times paper handlers are represented by the Union and are employed on both a full-time and a part-time basis. Full-time paper handlers are permanent employees of the Sun-Times and are hired by the newspaper, while part-time paper handlers are assigned to the Sun-Times by the Union during vacation and overload periods. In addition to their other duties, full-time paper handlers, unlike their part-time counterparts, regularly perform a variety of tasks involving the operation of heavy lift-trucks. Consequently, in 1984, the Sun-Times implemented a hiring policy requiring all future full-time paper handlers to have significant lift-truck experience.

Appellant Ronald Mays, a black man, has been a part-time paper handler at the Sun-Times since 1982. In both 1984 and 1985, Mays applied for but failed to obtain a full-time paper handler's position at the Sun-Times. Both positions were ultimately filled by white men who, unlike Mays, possessed significant lift-truck experience.

After being passed over twice for full-time paper handler positions and obtaining a right to sue letter from the Equal Employment Opportunity Commission, Mays filed

suit against both the Sun-Times and the Union in state court. The suit alleged that the Sun-Times violated Title VII by basing its hiring decisions on racial considerations; that the Union participated in these decisions; and that the Union failed to adequately represent Mays. The suit was removed to federal court and, in November 1987, the district judge granted summary judgment in favor of both the Sun-Times and the Union on all counts. Mays appeals from this decision.

II.

Rule 56(c) of the Federal Rules of Civil Procedure provides that "summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Thus, in order to defeat a motion for summary judgment a party must demonstrate that there is a *material* factual dispute drawing all *reasonable* inferences in the light most favorable to the non-movant. *Harris Trust v. Edelson*, Nos. 87-2487 & 87-2549 slip op. at 5 (7th Cir. Oct. 12, 1988); *Davis v. City of Chicago*, 841 F.2d 186, 189 (7th Cir. 1988). Moreover, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

A.

Appellant's first claim is that the Sun-Times violated Title VII by basing its hiring of full-time paper handlers on racial considerations. In the district court, Mays attempted to prove this charge through both direct and indirect evidence. Appellant's direct evidence consisted of an affiant's allegations that a Sun-Times official with responsibility for hiring full-time paper handlers had made

unfavorable remarks about blacks. The affiant, however, could not remember the context in which these remarks were made. Given this lack of context, no reasonable jury evaluating affiant's allegations in the light most favorable to the appellant could find for Mays. Consequently, the district court properly concluded that appellant's direct evidence of racial discrimination was not sufficient to defeat the Sun-Times' motion for summary judgment.

Appellant also attempted to prove his charge against the Sun-Times indirectly. The indirect method of establishing a Title VII violation consists of a series of burden-shifting steps. Initially, a plaintiff must make out a prima facie case of racial discrimination. Establishing a prima facie case requires a showing that (1) plaintiff belongs to a racial minority; (2) plaintiff applied for and was qualified for the available position; (3) plaintiff failed to obtain the position and (4) the job remained open and the employer sought out other applicants of plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Once a plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the defendant to articulate a legitimate non-discriminatory reason for the particular decision. *Id.* When the defendant articulates such a reason, the plaintiff must respond by adducing evidence that the ostensibly non-discriminatory explanation is in fact a pretext for discrimination. If the plaintiff fails to adduce sufficient evidence from which a reasonable juror could conclude that "pretext" existed, the district court should enter summary judgment in favor of the defendant. *Klein v. Trustees of Indiana University*, 766 F.2d 275, 282 (7th Cir. 1985).

The district court assumed, albeit reluctantly, that Mays had established a prima facie case of discrimination against the Sun-Times.[1] The Sun-Times responded by articulating

[1] The district court doubted that Mays was qualified to be a full-time paper handler but assumed this fact because defendants had failed to dispute the issue.

a legitimate non-discriminatory reason for its hiring decisions—that Craig and Stortenbecker, the white men actually hired, both had significant lift-truck experience and thus were better qualified than Mays. At this point, Mays, in order to avoid summary judgment under *Klein*, had to adduce evidence from which a reasonable juror could conclude that the Sun-Times' non-discriminatory explanation was pretextual.

Mays' pretextual evidence consisted primarily of affidavits filed by two former full-time paper handlers at the Sun-Times, Robert Myers and Lylbum French.[2] These affidavits attacked the validity of the Sun-Times' non-discriminatory explanation in two respects. First, the affiants claimed that significant lift-truck experience was not a prerequisite to obtaining a full-time paper handler's position at the Sun-Times. Second, the affiants alleged that Craig and Stortenbecker lacked lift-truck experience and thus were not better qualified than Mays.

Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part:

> Supporting and opposing affidavits shall be based on personal knowledge. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading,

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[2] Appellant also attempted to show pretext through statistical evidence. Appellant's statistical evidence revealed that few blacks were working as full-time paper handlers at the Sun-Times but failed to demonstrate how many blacks had actually applied for these positions. The district court held that this defect rendered appellant's statistical evidence insufficient to defeat a motion for summary judgment on the issue of pretext. We agree. In a race-discrimination case, statistical evidence of few black workers without concomitant evidence that substantial numbers of blacks had actually applied for the particular jobs is not probative of the charge that the employer had excluded blacks from employment. The employer might in fact have hired all the blacks that actually applied for the positions.

> but the adverse party's response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment is appropriate.

The district court held that the affidavits submitted by the plaintiff failed to conform to the standards of Rule 56(e) and thus refused to consider the allegations contained therein. As a result, the district court held that plaintiff had failed to rebut the Sun-Times' non-discriminatory explanation, and entered summary judgment under *Klein*. We agree with this decision.

Affiants' first allegation is based on the fact that they were hired as full-time paper handlers at the Sun-Times without possessing significant lift-truck experience. Myers and French, however, were hired before the Sun-Times implemented its new hiring policy. Thus, their personal experiences were not relevant to the issue of the policy's existence. Moreover, because the affiants' personal experiences formed the basis of their allegations, the district court properly held that the affidavits failed to set forth specific facts demonstrating that there was a genuine issue as to the existence of a hiring policy for full-time paper handlers.

The affidavits also alleged that Craig and Stortenbecker lacked significant lift-truck experience. This allegation was based on statements made by Craig and Stortenbecker to the affiants that cast on doubt their ability to operate heavy lift-trucks. Myers and French, however, admitted that they lacked personal knowledge of Craig's and Stortenbecker's prior lift-truck experience. Consequently, the district court properly refused to consider this allegation in evaluating the motion for summary judgment and correctly concluded that the affidavits failed to raise a genuine issue of fact as to Craig's and Stortenbecker's lift-truck experience.

B.

Mays also appeals from the district court's grant of summary judgment in favor of the Union. Appellant's first claim is that the Union participated in the Sun-Times' discriminatory hiring decisions. The short answer to this assertion is that the relevant hiring decisions were not discriminatory. Thus, even if the Union had some input into the hiring of full-time paper handlers, its conduct did not violate Title VII. Moreover, we agree with the district court that the evidence adduced by Mays failed to establish a genuine issue as to whether the Union had input into the hiring of full-time paper handlers.

May also claims that the Union, by refusing to file grievances with the Sun-Times when he was passed over for a full-time position, failed to adequately represent him. In order to prevail on an inadequate representation claim, a plaintiff must demonstrate that the union committed intentional misconduct. *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 243 (7th Cir.) *cert. denied*, 477 U.S. 908 (1986); *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522 (7th Cir. 1981). "Intentional misconduct means sabotaging a 'possibly meritorious grievance . . . because the worker is on the outs with the union or is a member of some racial or other minority or is not a union man . . . .'" *Camacho* at 244 (quoting *Dober v. Roadway Express, Inc.*, 707 F.2d 292, 294 (7th Cir. 1983). After reviewing the record, we agree with the district court that Mays failed to adduce any evidence on this point. Accordingly, the district court properly entered summary judgment in favor of the Union on Mays' inadequate representation claim.

In sum, we hold that Mays failed to adduce sufficient evidence on any of his claims against either the Sun-Times or the Union to avoid a motion for summary judgment. Accordingly, we affirm the district court's decision in all respects.

III.

Appellee Union contends that Mays' appeal from the district court's grant of summary judgment is frivolous within the meaning of Federal Rule of Appellate Procedure 38 and asks us to assess appropriate sanctions under that provision. In order to impose sanctions under Rule 38, we must make two determinations. First, we must find that the appeal is in fact frivolous. Second, we must determine that sanctions are appropriate in this case. *See Harris Trust and Savings Bank v. Edelson*, Nos. 87-2487 & 87-2549 slip op. at 12-13 (7th Cir. Oct. 12, 1988); *Spiegel v. Continental Illinois National Bank*, 790 F.2d 638, 650 (7th Cir.) *cert. denied*, 479 U.S. 987 (1986); *Indianapolis Colts v. Mayor and City Council of Baltimore*, 775 F.2d 177, 184 (7th Cir. 1985).

"An appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit." *Indianapolis Colts v. Mayor and City Council of Baltimore*, 775 F.2d 177, 184 (7th Cir. 1985). Under this standard, an appeal is frivolous when the appellant merely restates arguments that the district court properly rejected. *Spiegel v. Continental Illinois National Bank*, 790 F.2d 638, 650 (7th Cir.) *cert. denied*, 479 U.S. 987 (1986). We believe that Mays' appeal is frivolous under this standard. In this court, Mays essentially argues that the affidavits submitted by French and Myers sufficed to defeat a motion for summary judgment. This argument, however, was considered, and in our view properly rejected by the district court. Consequently, Mays' appeal was frivolous within the meaning of Federal Rule of Appellate Procedure 38.

Having determined that petitioner's appeal was frivolous, we must next determine whether sanctions are appropriate in this case. Sanctions are appropriate if "the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or sheer obstinacy." *Reid v. United States*, 715 F.2d 1148, 1155 (7th Cir. 1983). Moreover, Rule

38 sanctions may be assessed against either an appellant or an appellant's attorney. *See Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1201 (7th Cir. 1987).

In this case, the district court's opinion cogently explained why plaintiff's affidavits were not sufficient to defeat a motion for summary judgment. Given the incisive nature of the district court's opinion, appellant's attorney could not have had a reasonable expectation that the same arguments would prevail in this court and merely delayed the inevitable by filing this appeal. Consequently, we find that Rule 38 sanctions are appropriate in this case.

Finally, we must determine what sanctions to impose and against whom. Rule 38 serves two purposes. First, it compensates victorious parties in the district court for the expense and delay of defending against meritless arguments in the court of appeals. Second, it attempts to deter meritless appeals and preserve the appellate court calendar for cases worthy of consideration. *Ruderer v. Fines*, 614 F.2d 1128, 1132 (7th Cir. 1980) (per curiam). After evaluating plaintiff's appeal with these considerations in mind we conclude that the most appropriate sanction in this case is to assess the costs of this appeal against appellant's attorney. Accordingly, appellees are ordered to file with this court within fifteen days of the date of this opinion a statement of the costs they incurred in defending the appeal of the district court's grant of summary judgment.

IV.

We also believe that statements contained in appellant's brief violate Rule 11 of the Federal Rules of Civil Procedure and thus warrant the imposition of sanctions pursuant to Rule 46(c) of the Federal Rules of Appellate Procedure. Rule 11 provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual

> name. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or its own initiative, shall impose upon the person who signed it, a represented party, or both an appropriate sanction. . . .

Although Rule 11 "is not incorporated by reference or otherwise in any rule of this court, its requirements help to define conduct becoming a member of the bar [under Federal Rule of Appellate Procedure 46]." *In Re Kelley*, 808 F.2d 549, 551 (7th Cir. 1986). Accordingly, Federal Rule of Appellate Procedure 46 authorizes this court to impose sanctions on an attorney whose conduct violates Rule 11.[3]

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[3] Rule 46(c) of the Federal Rules of Appellate Procedure provides in pertinent part:

> A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar. . . .

Although this provision seems to require this court to afford an attorney an opportunity to be heard before imposing sanctions, we have held that a hearing is not required when it would not assist the court in reaching its decision. *See Hill v. Norfolk and Western Railway Company*, 814 F.2d 1192, 1201-03 (7th Cir. 1987). We do not believe that a hearing in this case would assist the court in any way.

In arguing that summary judgment in favor of the Union was improperly granted, appellant's brief states: "The union, in fact, has been *cited* by this court for its disgraceful hiring and employment record," and references *Graphic Communications Union v. Chicago Paper Handlers' and Electrotypers' Local No. 2 v. Chicago Tribune*, 794 F.2d 1222, 1224 (7th Cir. 1986) as support for this assertion. Our review of this decision, however, failed to reveal language that even indirectly supports appellant's very serious charge.[4] We can think of no better example of a pleading not well grounded in fact or law than a brief that falsely imputes a particular position to this court.

Although appellant's assertion about the Union is the most egregious example of a statement not well-grounded in fact or law it is not the only such statement contained in his brief. Thus, appellant asserts that: "No one disputes that both the Union and the Sun-Times have a dismal record of hiring and employing minorities in full-time paper handler positions." Both the Union and the Sun-Times, however, strongly dispute this assertion. Finally, appellant's brief in an effort to prove that the Sun-Times retaliates against blacks who assert their rights, states that "Lylbum French was fired after filing a race discrimination charge against the Sun-Times." French was in fact fired before filing a race discrimination charge against the Sun-Times.

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[4] The sentence that most closely approximates the brief's statement is contained at 794 F.2d 1224. There, the court stated: "In a letter to the Union, the *Tribune* expressed concern with respect to what it perceived to be an increase in the number of lawsuits challenging hiring practices as discriminatory and its view that employers who hire through union callrooms would not be insulated from liability in the event a union's hiring practices were found to be unlawful." Even given, its most liberal construction, this sentence cannot be read as indicating this court's disapproval of the Union's hiring practices. In fact, the Union's hiring practices were not at issue in the case.

In sum, appellant's brief contains several statements that are not well-grounded in fact or law. After considering the extent and nature of these statements, we believe that a significant penalty is warranted. Accordingly, pursuant to Rule 46(c) of the Federal Rules of Appellate Procedure, we fine appellant's attorney $1000, payable by certified check to the United States Treasury to be tendered in the clerk's office within two weeks of the date of this opinion.[5]

V.

We affirm the district court's grant of summary judgment in favor of the Sun-Times and the Union on all counts and assess the costs of this appeal against appellant's attorney under Federal Rule of Appellate Procedure 38. In addition, pursuant to Rule 46(c) of the Federal Rules of Appellate Procedure we fine appellant's attorney $1000 for filing a brief with this court containing statements not well-grounded in fact or law. Accordingly, the district court's decision is AFFIRMED WITH SANCTIONS.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[5] Rule 46(c) authorizes this court to impose monetary penalties. *See United States v. Bush*, 797 F.2d 536, 538 (7th Cir. 1986) (per curiam).

United States Court of Appeals For the Seventh Circuit
Chicago, Illinois 60604

February 24, 1989

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

RONALD MAYS,
Plaintiff-Appellant
No. 87-3083 vs.

CHICAGO SUN-TIMES GRAPHIC COMMUNICATIONS UNION, and CHICAGO PAPER HANDLERS' AND ELECTROTYPERS' LOCAL No. 2, AFL-CIO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois
Eastern Division
No. 86 C 4945
Judge Frank J. McGarr

ORDER

The slip opinion published on January 4, 1989 in the above-entitled matter is hereby amended as follows:

Page 10, footnote 3, sentence starting with "Although this provision . . ." should be deleted to the end of the footnote and replaced with: "In this case, the brief submitted by the Union requested sanctions based on the misrepresentations contained in appellant's brief. Therefore, appellant's counsel was on notice that disciplinary action might be forthcoming. Appellant's counsel was afforded the opportunity to explain why he should not be

sanctioned for the statements in his brief at oral argument where we repeatedly questioned him about the veracity of these statements. Finally, appellant's counsel did not request a hearing on possible sanctions. Consequently, Rule 46 sanctions may be imposed in this case."

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RONALD MAYS,
Plaintiff,

v.

CHICAGO SUN-TIMES and GRAPHIC COMMUNICATIONS UNION, CHICAGO PAPER HANDLERS' & ELECTROTYPERS' LOCAL No. 2, AFL-CIO,

Defendants.

No. 86 C 4945

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motions of defendants, Chicago Sun-Times ("Sun-Times") and Graphic Communications Union, Chicago Paper Handlers' & Electrotypers' Local No. 2, AFL-CIO ("union") for summary judgment against plaintiff, Ronald Mays ("Mays"). For the reasons which follow, the Sun-Times' and union's motions for summary judgment are granted.

The following is a brief statement of facts in this action. The Sun-Times publishes a daily metropolitan newspaper. In its pressroom and warehouse, the Sun-Times employs full and part-time paper handlers. The union, under a collective bargaining agreement with the Sun-Times, operates a "call-room" for part-time/temporary employees. The union assigns the temporary paper handlers to the Sun-Times when the Sun-Times requests

extra help. The agreement provides that the Sun-Times is the sole judge as to the number and function of employees at the Sun-Times. In addition, the agreement sets forth a procedure for filing grievances with the union.

Plaintiff Mays has worked as a temporary paper handler for the Sun-Times since April of 1982. In late 1984, two full-time paper handler positions became available. Mays did not receive either of these positions. Instead, the Sun-Times hired Mark Craig and Donald Stortenbecker to fill the vacancies. Mays thereafter filed a charge of race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, *et seq.*, against both the union and Sun-Times with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued Mays a right-to-sue letter. Mays then filed the present suit in state court and the case was removed to this court.

In a Title VII employment discrimination-disparate treatment action, the ultimate issue is whether the employer intentionally discriminated against plaintiff. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). A plaintiff can prove discrimination with either direct or indirect evidence. Under the direct approach, plaintiff presents direct evidence of intentional discrimination and defendant attempts to rebut the evidence. The more common approach is through indirect evidence. The courts, attempting to ease the plaintiff's evidentiary burden, have adopted special rules of proof for the indirect method of proving discrimination. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court set forth the parties' evidentiary burdens. Under Title VII, the plaintiff must initially establish a *prima facie* case of racial discrimination. A *prima facie* case may be made by showing (1) that plaintiff belongs to a racial minority; (2) that plaintiff applied for and was qualified for the available position; (3) that plaintiff was denied the job; and (4) the job remained open and the employer sought out other applicants of plaintiff's qualifications. *McDonnell*

Douglas, 411 U.S. at 802. Upon plaintiff presenting his *prima facie* case, the burden shifts to the employer "to articulate some legitimate nondiscriminatory reason" for rejecting plaintiff. *Ibid.* The burden then shifts back to plaintiff to prove that the employer's articulated reason is a pretext for a discriminatory purpose. *Id.* at 804. Pretext can be shown "[1] directly by persuading the court that a discriminatory reason more likely motivated the employer or [2] indirectly by showing that the employer's proferred explanation is unworthy of credence." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, at 256 (1981).

The present motions require the court to determine whether defendants are entitled to summary judgment. Federal Rule of Civil Procedure 56 provides that summary judgment "shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Supreme Court recently clarified the proper approach to summary judgment in a trilogy of cases: *Anderson v. Liberty Lobby, Inc.*,_____U.S._____, 106 S.Ct. 2505 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*,_____U.S._____, 106 S.Ct 1348 (1986), and *Celotex Corp. v. Catrett*,_____U.S._____, 106 S.Ct. 2548 (1986).

In *Anderson*, the Court emphasized the terms "material" and "genuine" in Rule 56. Material facts, the Court stated, are determined by substantive law. *Anderson*, 106 S.Ct. at 2510. "Only disputes over facts that affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Ibid.* Further, Rule 56 requires genuine issues of material fact. The controversy over a material fact must be genuine such that a reasonable jury "could return a verdict for the nonmoving party" upon the evidence presented. *Id.* at 2510. As the rule itself provides in 56(e), the opposing party "must set forth specific facts showing that there is a genuine issue for trial."

"There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson* at 2511. Lastly, on a summary judgment motion, the court "will view the evidence and the reasonable inferences drawn from the evidence in the light most favorable to . . . the party opposing the motion." *Selsor v. Callaghan & Co.*, 609 F. Supp. 1003, at 1007 (N.D. Ill. 1985).

This court will first address the union's motion for summary judgment. Mays' allegations against defendant union are two-fold. Mays claims (1) that the union failed to properly represent him, and (2) that the union participated in the alleged discrimination with the Sun-Times. The only evidence plaintiff has presented to support his claims is broad conclusory statements regarding the union's participation in hiring full-timers. These statements given by Mays and two affiants, Lylbum French and Robert Myers, are not specific as required by Rule 56. In the depositions of Mays, French and Myers, none could support their assertions with specific facts. For example, French, in his deposition, stated that he had no personal knowledge that the union and the Sun- Times jointly determine who will be hired as a full-time paper handler. As to the allegation that the union did not adequately represent Mays, no genuine issue of material fact exists. Mays has presented no evidence whatsoever to support this claim. It is well settled that "the party resisting the summary judgment motion may not rest on mere allegations." *Klein v. Trustees of Indiana University*, 766 F.2d 275, at 283 (7th Cir. 1985). As to Mays' second claim of joint participation in the hiring decision, Mays has failed to produce sufficient evidence from which this court can determine that a reasonable jury could find in plaintiff's favor and against the union. Therefore, this court grants summary judgment in favor of defendant union.

As to the claims against the Sun-Times, a more detailed analysis is required. Mays attempts to prove intentional discrimination both directly and indirectly. Mays' direct evidence

consists of statements made by James Brady, warehouse and paper handling superintendent at the Sun-Times, to Mays and affiant Robert Myers. One statements Mays relies upon was allegedly made when Mays applied to Brady for one of the open positions. Brady responded to Mays, "Go back to the Tribune, they are hiring." This statement by itself does not suggest that any racial discrimination was involved. Further, as the Sun-Times points out, Mays stated in his deposition that no one at the Sun-Times ever made any comment to Mays or about Mays regarding his race. This statement, coupled with plaintiff's concession, does not provide Mays with any evidence of racial discrimination.

The other statements Mays relies on were allegedly made by Brady to Robert Myers, a former full-time employee at the Sun-Times. In his affidavit, Myers stated that Brady told him he liked blacks too much and threatened to get Myers. Further, Brady stated that "the few 'niggers' he had working there were his [Brady's] concern and he [Brady] did not want any white man putting ideas in their heads." However, in Myers' deposition, Myers was unable to state when these statements took place, where they took place, or in whose presence they took place. It is clear that they were not made to Mays or in any context involving Mays. Given the lack of context of these statements, this evidence is too remote to determine that a genuine issue of material facts exists. A reasonable jury could not find in Mays' favor based on the direct evidence. These statements, even though taken as true for the purposes of this motion, fail to present any evidence significantly probative as to whether Mays' race was the determining factor in the Sun-Times' decision not to hire him as a full-timer. *La Montague v. American Convenience Products, Inc.*, 750 F.2d 1405 (7th Cir. 1984).

Since Mays' direct evidence fails to present any genuine issue of material fact, the court will look to the indirect evidence under the *McDonnell Douglas* guidelines presented above. As to

Mays' *prima facie* case, the only criteria in dispute is element 2, plaintiff's qualifications. However, the briefs of Mays and the Sun-Times regarding this motion focus primarily on pretext. The Sun-Times argues that Mays was not qualified for the position and they hired more qualified individuals. Mays argues first that no experience is necessary for the position and second that the individuals who were hired were not qualified. While it seems that plaintiff may have failed to present a prima facie case, the court will assume for purposes of analysis that plaintiff has met his burden. *See Selsor v. Callaghan & Co.*, 609 F. Supp. 1003 (N.D. Ill. 1985).

The burden now shifts to the Sun-Times to articulate its nondiscriminatory reason. The Sun-Times asserts that Mark Craig and Donald Stortenbecker were more qualified and more experienced than Mays. As the Sun-Times correctly points out, the decision to hire individuals with greater experience and better qualifications is a legitimate nondiscriminatory reason in determining which applicants to hire. Therefore, the burden shifts back to Mays to establish pretext.

Mays' burden to establish pretext can be met by showing either the Sun-Times' reason is "unworthy of credence" or that "a discriminatory reason more likely motivated" the Sun-Times. *Burdine*, 450 U.S. at 258. Mays attempts to attack the credence of the Sun-Times' reason by asserting that Mark Craig and Donald Stortenbecker were not more experienced and better qualified than plaintiff. In support of this claim, Mays submits the affidavits of former Sun-Times employees, Lylbum French and Robert Myers. Myers states that Craig "asked me to teach him how to operate a lift truck." Myers also states that Stortenbecker did no know how to operate a lift truck. French's affidavit likewise states that Craig and Stortenbecker could not drive Jeep lift trucks when they were hired. However, in their depositions, French and Myers admit they have no personal knowledge as to the experience and qualifications of Craig and Stortenbecker.

Pursuant to Rule 56, affidavits must be based on personal knowledge. This court is not to consider nor give any weight to statements not based on personal knowledge. The only statement based on personal knowledge is that Craig allegedly asked Myers how to operate the lift truck. This statement is questionable since, in his deposition, Myers testified that Craig asked him not how to drive the truck but "how the levers functioned on the Jeep." Though the difference is slight, it is reasonable to assume that, while lift trucks generally work in the same manner, the levers and controls may vary depending on the make and model. In any respect, these statements do not raise any genuine issue of material fact as to whether Craig and Stortenbecker were better qualified and more experienced. Mays has failed to prove specific facts which would permit a reasonable jury to find that Craig and Stortenbecker were not more qualified and experienced than Mays.

Similarly, Mays has not raised any issue of fact regarding his assertion that experience with lift trucks is not necessary to be hired as a full-time paper handler. Again, Mays' evidence consists of statements of French and Myers. French and Myers state that they were hired as full-timers without lift truck experience. However, these two affiants were hired under a different superintendent and prior to a 1984 Sun-Times rule requiring full-timers to have lift truck experience. Therefore, the facts regarding the hiring of Mays and French are not applicable to Mays' claim. Since the evidence is irrelevant to the present action, Mays has failed to raise any genuine issue with respect to lift truck experience. Further, affiants in their depositions that they do not know how the hiring decisions were made as to Craig and Stortenbecker.

Lastly, Mays attempts to establish pretext by asserting that the Sun-Times has a poor record of minority hiring and has engaged in a pattern of discrimination against Mays. Again, Mays relies on broad conclusions asserting that the Sun-Times has engaged

in systematic exclusion of blacks. Mays' affidavits state that only three blacks were hired as full-time paper handlers since Mays brought this claim. Further, of those three, only one is left. These statements are insufficient to preclude summary judgment. As to minority hiring, the fact standing alone that only three black were hired does not establish a poor hiring record. No evidence exists as to how may blacks applied for full-time positions. Mays' statement of specific examples of the Sun-Times and union discriminatory pattern are simply reassertions of statements this court has previously addressed. Mays has failed to present any evidence to create a genuine issue of material fact as to the Sun-Times' legitimate nondiscriminatory reason for not hiring Mays.

Plaintiff Mays has failed to raise any genuine issues of material fact such that a reasonable jury could render a verdict in Mays' favor and against the Sun-Times or the union. Therefore, defendants Sun-Times and the union are entitled to a judgment as a matter of law. For the reasons stated, the motions of the union and the Sun-Times for summary judgment are granted.

ENTER:

/s/_____
UNITED STATES DISTRICT JUDGE

DATED: November 12, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RONALD MAYS,
Plaintiff,

v.

CHICAGO SUN-TIMES and GRAPHIC COMMUNICATIONS UNION, CHICAGO PAPER HANDLERS' & ELECTROTYPERS' LOCAL No. 2, AFL-CIO,

Defendants.

No. 86 C 4945

MEMORANDUM OPINION AND ORDER

In an opinion dated November 12, 1987, this court granted the motion for summary judgment of the defendant Sun-Times and the defendant union. The court now has before it a motion for reconsideration in view of recent opinions.

The court has examined the recent opinions brought to its attention. *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987), and *Coston v. Plitt Theatres, Inc.*, _____F.2d_____(7th Cir. Sept. 23, 1987), Nos. 86-2109, 86-2137, and 86-2144. These cases do not affect the underlying principles on which this court's decision was based and are not an adequate basis for reconsideration of the November 12 opinion.

An additional ground urged in support of the motion for reconsideration is the contention that plaintiff filed this case *pro se* and his later representation by counsel commenced just before

the briefing on the motion in question, without the *pro se* plaintiff having engaged in any discovery, while on the other hand, defendants had the advantage of some discovery in the form of depositions of plaintiff's affiants.

It is plaintiff's obligation to support his contention, in response to defendant's motion for summary judgment that there are controverted factual issues. Plaintiff did so by supplying affidavits of potential witnesses. The depositions of those affiants tested the affidavits, and the conclusions of the court upon this record before it was that there were not contested issues of fact sufficient to bar the entry of summary judgment. Plaintiff was represented by counsel during this portion of the case, and his lack of representation by virtue of his *pro se* status earlier in the case did not operate to deprive him of the assistance of counsel vis-a-vis the issue now before the court.

For the foregoing reasons, the plaintiff's motion for reconsideration of the court's opinion of November 12, 1987 granting summary judgment is denied.

ENTER:

/s/_____
UNITED STATES DISTRICT JUDGE

DATED: November 24, 1987

JUDGMENT - ORAL ARGUMENT
United States Court of Appeals For the Seventh Circuit
Chicago, Illinois 60604

January 4, 1989

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

RONALD MAYS,
Plaintiff-Appellant,

No. 87-3083 vs. CHICAGO SUN-TIMES GRAPHIC COMMUNICATIONS UNION, and CHICAGO PAPER HANDLERS' AND ELECTROTYPERS' LOCAL No. 2, AFL-CIO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois
Eastern Division
No. 86 C 4945
Judge Frank J. McGarr

This cause was heard in the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED WITH SANCTIONS, in accordance with the opinion of this Court filed this date. Appellant's attorney is fined the sum of $1,000.00 for filing a brief with this Court containing statements not well-grounded in fact or law. This fine shall be paid by certified check payable to the United States Treasury, tendered to the clerk of this Court within two weeks of the date of this opinion.

United States Court of Appeals For the Seventh Circuit
Chicago, Illinois 60604

February 7, 1989

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

RONALD MAYS,
Plaintiff-Appellant

No. 87-3083 vs.

CHICAGO SUN-TIMES GRAPHIC COMMUNICATIONS UNION, and CHICAGO PAPER HANDLERS' AND ELECTROTYPERS' LOCAL No. 2, AFL-CIO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois
Eastern Division
No. 86 C 4945
Judge Frank J. McGarr

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
SEP 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1756

In the Supreme Court of the United States

OCTOBER TERM, 1989

L. STEVEN PLATT, PETITIONER

v.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, *et al.*, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN OPPOSITION

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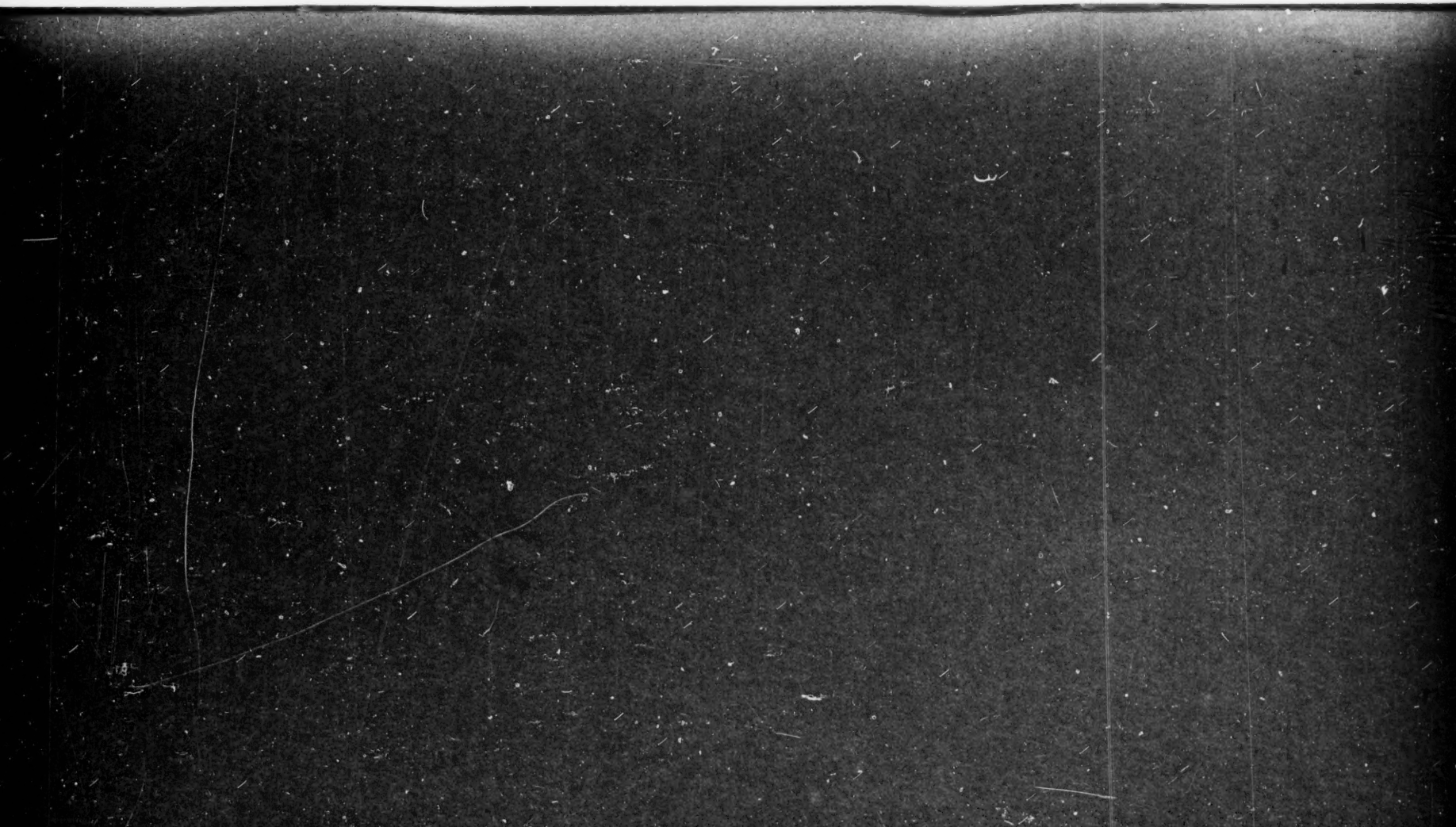

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in imposing costs on petitioner under Fed. R. App. P. 38 for filing a frivolous appeal, when the brief petitioner submitted in the court of appeals included a number of material misrepresentations and failed to address the reasons that the district court gave for ruling against petitioner's client.

2. Whether the court of appeals abused its discretion in imposing a $1,000 fine on petitioner under Fed. R. App. P. 46(c) for conduct unbecoming a lawyer, when petitioner's brief on appeal made material misrepresentations of fact and law.

3. Whether petitioner received adequate notice and hearing concerning potential discipline for these misrepresentations, when his opponents' briefs identified the misrepresentations and requested sanctions, petitioner had an opportunity in his reply brief to explain the statements, and the court of appeals questioned him at length during oral argument concerning the accuracy of the statements.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1756

L. STEVEN PLATT, PETITIONER

v.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, *et al.*, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 865 F.2d 134. The memorandum opinion and order of the district court (Pet. App. 15a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989. A petition for rehearing with suggestion for rehearing en banc was denied on February 7, 1989. Pet. App. 26a. The petition for a writ of certiorari

was filed on April 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

Petitioner L. Steven Platt is an attorney who represented a client in an unsuccessful appeal to the United States Court of Appeals for the Seventh Circuit. He now names the court of appeals as a respondent in a petition asking this Court to review the assessment of costs against him under Fed. R. App. 38 for taking a frivolous appeal and the imposition of a fine of $1,000 under Fed. R. App. P. 46 for conduct unbecoming a member of the bar. This routine, fact-bound attorney discipline dispute does not warrant further review.

1. In 1986 Ronald Mays, a part-time paper handler at the Chicago Sun-Times, sued the Sun-Times and the Chicago Paper Handlers Union in state court alleging that the newspaper refused to hire him for a full-time position as a paper handler because of his race and that the union failed adequately to represent him. The Sun-Times and the union removed the case to the United States District Court for the Northern District of Illinois.

After taking Mays' deposition, the Sun-Times and the union moved for summary judgment under Fed. R. Civ. P. 56. At that point, Mays retained petitioner Platt, who filed an opposition to the motion for summary judgment, attaching Mays' deposition and affidavits from two former full-time paper handlers at the Sun-Times, Robert Myers and Lylbum French. The defendants then deposed Myers and French and filed reply briefs.

On November 12, 1987, the district court granted summary judgment for the defendants. The court found

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[1] On July 12, 1989, this Court requested that the court of appeals file a response to the petition by August 11, 1989. Subsequently, on August 1, 1989, the Court granted an extension of time until September 5, 1989, for the court of appeals to respond.

that the "broad conclusory statements" by Mays, Myers, and French failed to set forth "specific facts" concerning the union's participation in hiring decisions, as required by Rule 56(e).[2] The court also held that Mays had "presented no evidence whatsoever" of inadequate representation by the union. Pet. App. 18a.

As to the claim against the Sun-Times, the district court first found that Mays' direct evidence, consisting of alleged racially-discriminatory statements by a Sun-Times supervisor, either did not suggest discrimination or lacked sufficient contextual relationship to create a genuine issue of material fact regarding the treatment of Mays himself. Pet. App. 19a. Turning to Mays' indirect evidence of discrimination, the district court questioned whether Mays had established a *prima facie* case sufficient to impose a burden on the Sun-Times to justify its hiring decision. But even assuming that he had, the court found that the evidence failed to create a genuine issue of material fact on the critical issue of whether the Sun-Times' asserted reason for not hiring Mays—that the persons hired had greater qualifications and experience—was a pretext for discrimination.[3] Pet. App. 20a-21a.

---

[2] Rule 56(e) provides in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. * * * When a motion for summary judgment is made and supported as provided in this rule, * * * the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[3] The affidavits that petitioner filed disputed the Sun-Times' justification for its decision but were insufficient under Rule 56 because the affiants acknowledged in their depositions that they had no personal knowledge of the experience or qualifications of the persons hired. Pet. App. 20a-21a. In addition, although the affiants claimed that their own experience proved (contrary to the Sun-

2. Mays appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit, and petitioner filed a brief on his behalf. The brief argued that the district court had "improperly weighed the evidence" concerning the union's alleged participation in the hiring decisions (Appellant's Br. 7) and had "ignored evidence" of inadequate representation by the union (*id.* at 9). (We have lodged with the Court copies of the briefs filed in the court of appeals.)

Concerning the claim against the Sun-Times, petitioner's brief first represented, inaccurately, that the district court held that Mays had presented a *prima facie* case of discrimination. Appellant's Br. 10-11.[4] The brief then summarized the same deposition and affidavit testimony that had been offered in opposition to the motion for summary judgment in an effort to show that the district court "ignored evidence of racial hostility by the decision-makers" (*id.* at 11), "ignored plaintiff's pretext evidence" (*id.* at 13), and improperly "made credibility findings" (*id.* at 15). Despite the district court's decision analyzing the deficiencies of Mays' evidence, petitioner's brief made no attempt to demonstrate that the proffered testimony met the requirements of Rule 56(e).

Appellees' briefs called petitioner to task for various other misrepresentations. Indeed, the union's brief explicitly requested sanctions under 28 U.S.C. 1912 and Fed. R. App. P. 38 on the ground that petitioner's brief misstated the record and made a "scurrilous" misrepresentation when it claimed that the union "ha[d] been

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Times' justification) that full-time paper handlers were not required to have experience operating lift trucks, the district court found (Pet. App. 21a) that the affiants' assertions were irrelevant because they had been hired before the Sun-Times imposed the requirement of lift truck experience.

[4] In fact, the district court stated that "plaintiff may have failed to present a prima facie case," but it "assume[d] for purposes of analysis that plaintiff ha[d] met his burden" to establish a *prima facie* case. Pet. App. 20a.

cited by [the Seventh Circuit in a prior case] for its disgraceful hiring and employment record." Union Br. 13, 9 & n.4; see Appellant's Br. 3. The Sun-Times' brief, although it did not seek sanctions, likewise accused petitioner of "flagrantly misstating and fabricating evidence in his Brief" (Sun-Times Br. 1) and provided numerous examples to substantiate this charge. See Sun-Times Br. 11-12, 18, 21 n.*, 25 n.*, 26-27 & n.*, 29 n.*, 30 n.*.

Petitioner filed a three-page reply brief that failed to respond either to the union's request for sanctions or to the Sun-Times' accusations of misrepresentations. At oral argument, the court of appeals questioned petitioner at length concerning the accuracy of various representations in his opening brief. Petitioner responded that the statements were true, although he "sincerely apologize[d]" if "counsel and * * * this court" had interpreted his brief to indicate that the court of appeals had previously found the union guilty of discrimination.

3. The court of appeals affirmed the district court's grant of summary judgment to the defendants. Pet. App. 1a. In addition, the court imposed sanctions against petitioner personally, charging him with costs under Rule 38 for pursuing a frivolous appeal and fining him $1,000 under Rule 46(c) "for filing a brief with this court containing statements not well grounded in fact or law." Pet. App. 2a.

In imposing Rule 38 sanctions, the court of appeals employed a two-part analysis established by prior cases, looking first to whether the appeal was frivolous and then to whether sanctions were appropriate. To determine whether the appeal was "in fact frivolous," the court followed prior circuit precedent establishing that "'[a]n appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit.'" Pet. App. 8a (quoting *Indianapolis Colts* v. *Mayor and City Council of Baltimore*, 775 F.2d 177, 184 (7th Cir. 1985)).

In explaining this standard, the court observed that "an appeal is frivolous when the appellant merely restates arguments that the district court properly rejected." Pet. App. 8a (citing *Spiegel* v. *Continental Ill. Nat'l Bank*, 790 F.2d 638, 650 (7th Cir.), cert. denied, 479 U.S. 987 (1986)). The court found the appeal frivolous because petitioner's only argument—"that the affidavits submitted by French and Myers sufficed to defeat a motion for summary judgment"—had been "considered, and in our view properly rejected by the district court." Pet. App. 8a.

Having determined that petitioner's appeal was frivolous, the court of appeals considered whether sanctions were appropriate. The court explained that "[s]anctions are appropriate if 'the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or sheer obstinacy.'" Pet. App. 8a (quoting *Reid* v. *United States*, 715 F.2d 1148, 1155 (7th Cir. 1983)). Applying this standard, the court of appeals held that "the district court's opinion cogently explained why plaintiff's affidavits were not sufficient to defeat a motion for summary judgment." Accordingly, petitioner "could not have had a reasonable expectation that the same arguments would prevail in this court and merely delayed the inevitable by filing this appeal." Pet. App. 9a.

Finally, the court of appeals concluded that petitioner's brief "contain[ed] several statements that are not well-grounded in fact or law" and that a fine was warranted under Rule 46(c), which authorizes discipline of an attorney for "conduct unbecoming a member of the bar." Pet. App. 12a. The "most egregious example" was petitioner's "very serious charge" that the union had been "'*cited* by [the Seventh Circuit] for its disgraceful hiring and employment record'"—a charge that was not "even indirectly support[ed]" by the decision petitioner

cited. Pet. App. 11a (emphasis in court's opinion).[5] But this was "not the only such statement contained in his brief." *Ibid.* For example, the brief asserted that "[n]o one disputes that both the union and the Sun-Times have a dismal record of hiring and employing minorities in full-time paper handler positions" (Appellant's Br. 3) —although in fact both the Sun-Times and the union had vigorously challenged that characterization. Pet. App. 11a. The brief also asserted that Lylbum French was "fired after filing a race discrimination charge" (Appellant's Br. 5), when in fact French had been fired by the Sun-Times before he filed a charge against the newspaper. Pet. App. 11a.

To determine whether petitioner's misrepresentations warranted disciplinary sanctions, the court of appeals took guidance from Fed. R. Civ. P. 11, which requires that all papers signed by an attorney be "well grounded in fact and * * * warranted by existing law." The court followed previous decisions recognizing that "Rule 11 'is not incorporated by reference or otherwise in any rule of this court' " but that the rule helps to define "conduct unbecoming a member of the bar" under Rule 46. Pet. App. 10a (quoting *In re Kelly*, 808 F.2d 549, 551 (7th Cir. 1986)).

Addressing the notice and hearing requirements of Rule 46(c), the court of appeals first concluded that "a hear-

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[5] As the court of appeals pointed out, the union's hiring practices were not at issue in that case (Pet. App. 11a n.4), and the only passage in the opinion that bore any relation to petitioner's allegation stated:

> In a letter to the Union, the Tribune expressed concern with respect to what it perceived to be an increase in the number of lawsuits challenging hiring practices as discriminatory and its view that employers who hire through union callrooms would not be insulated from liability in the event a union's hiring practices were found to be unlawful.

Graphic Communications Union v. *Chicago Tribune Co.*, 794 F.2d 1222, 1224 (7th Cir. 1986).

ing is not required when it would not assist the court in reaching its decision." Pet. App. 10a n.3. The court subsequently substituted for that statement the following (*id.* at 13a-14a):

> [T]he brief submitted by the Union requested sanctions based on the misrepresentations contained in appellant's brief. Therefore, [petitioner] was on notice that disciplinary action might be forthcoming. [Petitioner] was afforded the opportunity to explain why he should not be sanctioned for the statements in his brief at oral argument where we repeatedly questioned him about the veracity of these statements. Finally, [petitioner] did not request a hearing on possible sanctions. Consequently, Rule 46 sanctions may be imposed in this case.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and presents only a fact-bound issue concerning the imposition of attorney discipline in the particular circumstances of this case. We are advised, moreover, that the procedures to be followed in imposing sanctions on appeal are currently under consideration by the Advisory Committee on the Federal Rules of Appellate Procedure. Review by this Court is therefore unwarranted.[6]

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[6] The court of appeals has filed this brief at the request of the Court, but with serious reservations as to whether the court of appeals is properly named as respondent. Normally, the parties before this Court on a petition for certiorari are the "parties to the proceeding in the court whose judgment is sought to be reviewed" (S. Ct. R. 19.6). This Court, in the mandamus context, has noted its reluctance to make courts and judges parties in adversarial disputes. See, *e.g.*, *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). Insofar as the petition seeks review of the award of costs under Rule 38, we see no reason why the proper respondents are not the Sun-Times and the union, to whom the costs must be paid. The Rule 46 fine was payable to the United States Treasury. The proper respondent on that issue would seem to be the

I. The Court of Appeals Applied Proper Standards in Determining that the Appeal Was Frivolous Under Rule 38.

Petitioner's attack on the sanctions imposed under Rule 38 (Pet. 15-17) is based on an untenable construction of the court of appeals' opinion. According to petitioner, language in the opinion defining a "frivolous" appeal under Rule 38—"when the appellant merely restates arguments that the district court properly rejected" (Pet. App. 8a)—"could easily apply to most appeals in which the judgment below is affirmed." Pet. 16. In short, petitioner suggests that the Seventh Circuit imposes Rule 38 sanctions simply for an unsuccessful appeal. See also Chicago Council of Lawyers Amicus Br. 4. Obviously such a standard would be erroneous.

The court of appeals does not, however, apply such a standard. Petitioner omits to quote the preceding sentence of the court's opinion, which makes clear that "'[a]n appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit.'" Pet. App. 8a (citation omitted). This standard, which provides wide latitude for unsuccessful yet nonfrivolous appeals, is uncontroversial and, indeed, is employed by at least six other circuits. See, *e.g.*, *Reliance Ins. Co.* v. *Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C. Cir. 1986); *Standard Terry Mills, Inc.* v. *Shen Mfg. Co.*, 803 F.2d 778, 783 (3d Cir. 1986); *Coghlan* v. *Starkey*, 852 F.2d 806, 811 (5th Cir. 1988); *Insurance Co. of N. Am.* v. *Bay*, 784 F.2d 869, 872 (8th Cir. 1986); *Taylor* v. *Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984) (per

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United States. This Court treated the Eighth Circuit as a respondent in *In re Snyder*, 472 U.S. 634 (1985), another Rule 46 case, but *Snyder* involved suspension of an attorney, not a fine payable to the United States as in this instance.

Despite these reservations, the instant brief is filed on behalf of the court of appeals pursuant to this Court's request.

curiam); *Braley* v. *Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987) (en banc).

That the Seventh Circuit does not impose sanctions merely for unsuccessful appeals is further shown by the second part of its Rule 38 analysis, which also must be satisfied. For sanctions to be appropriate, an appeal must have been " 'prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or sheer obstinacy.' " Pet. App. 8a (quoting *Reid* v. *United States*, 715 F.2d 1148, 1155 (7th Cir. 1983)).

The Seventh Circuit has frequently stated that " '[a] frivolous appeal means something more to us tha[n] an unsuccessful appeal.' " *Oglesby* v. *RCA Corp.*, 752 F.2d 272, 280 (7th Cir. 1985) (quoting *NLRB* v. *Lucy Ellen Candy Div.*, 517 F.2d 551, 555 (7th Cir. 1975)); accord *Reid*, 715 F.2d at 1154. And the cases are legion in which the Seventh Circuit has rejected an appellant's arguments but found sufficient merit in them to deny Rule 38 sanctions. See, *e.g.*, *Staff Builders Services, Inc.* v. *NLRB*, No. 88-2308, slip op. at 10 (July 13, 1989) (decided *after* this case) ("although [appellant] was skating on thin ice, we deny the request for sanctions"); *United Steelworkers of Am.* v. *Danly Mach. Corp.*, 852 F.2d 1024, 1028 (1988) (the appellant's arguments, "though ultimately inapplicable in this case, had credence"); *Local 106* v. *Homewood Memorial Gardens, Inc.*, 838 F.2d 958, 961 (1988) (the appellant's "position is wrong, but not unwarranted"); *CNPA* v. *Chicago Web Printing Pressman's Union No. 7*, 821 F.2d 390, 398 (1987) ("[w]hile we disagree with [appellant's] novel argument, we refuse to say that it is without merit"); *Blau Plumbing, Inc.* v. *S.O.S. Fix-It, Inc.*, 781 F.2d 604, 612 (1986) ("[a]lthough [the appellant's] case is weak, the resolution of the case on [the appellee's] motion for summary judgment, while proper, was sufficiently debatable to prevent us from deeming the appeal frivolous"); *McConnell* v.

Surak, 774 F.2d 746, 752 (1985) (affirming the district court but concluding that the appeal "was not frivolous or meritless"); *Freeman* v. *Local Union No. 135*, 746 F.2d 1316, 1322 n.13 (1984) (although appellant "cited no cases in support of his contention, * * * his position on the issue is not unreasonable").

Indeed, in several cases the Seventh Circuit, while affirming the district court's judgment in the appellee's favor, has nonetheless sanctioned the *appellee* for bringing a frivolous request for sanctions on appeal. See, *e.g.*, *Foy* v. *First Nat'l Bank*, 868 F.2d 251, 258 (1989) (decided *after* this case) ("[W]e rebuke—we more than rebuke, we punish—Foy for his frivolous argument that the bank should be sanctioned for filing this appeal. Although we have ruled against the bank, it is obvious that the appeal is not frivolous"); *Meeks* v. *Jewel Companies*, 845 F.2d 1421, 1422 (1988). Cf. *SK Hand Tool Corp.* v. *Dresser Indus.*, 852 F.2d 936, 946 (7th Cir. 1988), cert. denied, 109 S. Ct. 3241 (1989) (declining to sanction appellee but adding: "[W]e are sharply critical of the attitude that sanctions requests can with impunity automatically attach to any appeal. We expect counsel to give considerable thought to whether an appeal is frivolous before requesting Rule 38 sanctions"). Thus, the court of appeals has acted vigorously to ensure that not "[e]very appellee who persuades the Court to affirm the reasoning of the district court" will file for sanctions, as *amicus* predicts will happen. Amicus Br. 4.

As these cases show, the court of appeals' practice under Rule 38 is fully consistent with this Court's own recent statement in *Talamini* v. *Allstate Ins. Co.*, 470 U.S. 1067 (1985), that damages should be assessed under S. Ct. R. 49.2 for a frivolous appeal or petition for certiorari only where the filing has "no legitimate prospect of success." *Id.* at 1071 (Stevens, J., writing for four-Justice plurality); see also *id.* at 1073 (Burger, C.J., writing for three Justices) (award of damages

proper under Rule 49.2 to discourage "patently meritless" filings).

Similarly, this Court's decision in *Neitzke* v. *Williams*, 109 S. Ct. 1827 (1989), far from casting doubt on the court of appeals' approach, shows that the court of appeals accurately distinguishes frivolousness from error. In *Neitzke*, this Court affirmed the Seventh Circuit's decision that an *in forma pauperis* complaint is not "frivolous" within the meaning of 28 U.S.C. 1915(d) merely because it fails to state a claim for which relief can be granted. 109 S. Ct. 1827, aff'g *Williams* v. *Faulkner*, 837 F.2d 304 (7th Cir. 1988) (opinion for the court of appeals by Judge Flaum, who wrote the opinion in this case).

Thus, we entirely agree with petitioner that it is not inherently improper for an appellant to base an appeal upon arguments that the district court has rejected. What is wholly unjustifiable, however, is to repeat those arguments without addressing or attempting to refute the reasons or authorities relied on by the district court or the findings it made in arriving at its ruling. See, *e.g.*, *Spiegel*, 790 F.2d at 650 ("perfunctory" brief "failed to explain how the district court decision was in error"). Similarly, the " 'tactic of pretending that potentially dispositive authority against a litigant's position does not exist' " is "unprofessional" and sanctionable under Rule 38. *Mars Steel Corp.* v. *Continental Bank N.A.*, No. 88-1554, slip op. at 19 (7th Cir. July 20, 1989) (quoting *Hill* v. *Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987)).

Several circuits agree with the Seventh Circuit that such a perfunctory appeal is frivolous under Rule 38.[7]

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[7] See, *e.g.*, *Johnson* v. *Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir.), cert. denied, 469 U.S. 1018 (1984) ("[Appellant] has absolutely failed to present any arguable reason why the district court erred in its disposition. She basically restates arguments that the district court properly rejected"); *Coghlan*, 852 F.2d at

The courts of appeals must be able to enforce this standard to protect their already-crowded dockets against insubstantial appeals. " 'Counsel must realize that the decision to appeal should be a considered one, *taking into account what the district judge has said*, not a knee-jerk-reaction to every unfavorable ruling.' " *Libby, McNeill, & Libby* v. *City Nat'l Bank*, 592 F.2d 504, 515 (9th Cir. 1978) (emphasis added) (quoting *Simon & Flynn, Inc.* v. *Time Inc.*, 513 F.2d 832, 835 (2d Cir. 1975) (per curiam)).

In this case, petitioner's appellate brief—while contending that the district court had "disregarded" the statements of Mays, Myers, and French—utterly failed to address the reasons and authority that the district court gave for disregarding those averments. For example, the district court, relying on Rule 56, refused to consider all but one of the assertions of Myers and French concerning the qualifications of the two white individuals hired as paper handlers because those assertions were not based on their personal knowledge (Pet. App. 21a).[8]

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809 (appellant's brief "makes hardly any attempt to distinguish precedents relied on below * * * and offers no independent legal analysis different from that decisively rejected by the district court"); *Olympia Co.* v. *Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985) ("appellate counsel made no attempt to address most of the issues raised in the district court's opinion"); *Libby, McNeill, & Libby* v. *City Nat'l Bank*, 592 F.2d 504, 514 (9th Cir. 1978) (appellant "has made no serious attempt to undermine the district court's basic conclusion").

[8] The only exception was Myers' allegation that one of the paper handlers (Craig) "asked me to teach him how to operate a lift truck." See Pet. App. 20a. The district court observed, however, that Myers had actually testified in his deposition that Craig simply asked him "how the levers functioned on the Jeep"—the particular model of lift truck. The court found Myers' statement insufficient to create a genuine issue of material fact concerning whether Mays was equally qualified as those hired. *Id.* at 21a. That conclusion was unassailable in view of the uncontroverted evidence that the individuals hired each had several years of full-time experience as paper handlers.

Yet petitioner's brief made no attempt either to show that the affiants had such knowledge or to defend the legal proposition that such knowledge was unnecessary. Likewise, again in total disregard of Rule 56 and the district court's reasoning (*ibid.*), the brief made no effort to show why the hiring of Myers and French, which occurred before the Sun-Times adopted a policy requiring lift truck experience, was relevant to hiring decisions once the policy was in effect.[9] Instead, referring repeatedly to his own opposition to the summary judgment motion, petitioner simply asserted that the district court made credibility determinations not appropriate at the summary judgment stage, when in fact the court's reasoning rested not on credibility but on lack of foundation.

The imposition of Rule 38 sanctions also was supported by the repeated misrepresentations in petitioner's brief (although the court of appeals relied explicitly on this ground only in imposing Rule 46 sanctions). See pp. 18-20, *infra*. It is generally recognized that "misstatements and misrepresentations of the record [may] further demonstrat[e] frivolousness" and thereby warrant Rule 38 sanctions. *Borowski* v. *DePuy, Inc.*, 850 F.2d 297, 306 (7th Cir. 1988); accord *Ortiz Villafane* v. *Segarra*, 797 F.2d 1, 2 (1st Cir. 1986) (awarding double costs and attorney's fees against counsel under Rule 38 for "blatant misrepresentations in appellant's brief"); *Medina* v. *Chase Manhattan Bank, N.A.*, 737 F.2d 140, 145 (1st Cir. 1984) (awarding double costs as "punitive sanctions * * * in view of the misstatements and misrepresentations contained in the plaintiff's appellate brief"); *Chalfy* v. *Turoff*, 804 F.2d 20, 23 (2d Cir. 1986) (awarding

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[9] The brief significantly misstated the district court's opinion in this respect, saying only that the court had held that Myers' and French's testimony was irrelevant "because their knowledge was based on service under a prior supervisor" (Appellant's Br. 13) and omitting to mention the change in the hiring policy on which the district court had placed equal reliance (see Pet. App. 21a).

attorney's fees, costs, and expenses under Rule 38 where appellants' brief, among other things, "mischaracterizes even their own affidavits"); *Herzfeld & Stern* v. *Blair*, 769 F.2d 645, 647 (10th Cir. 1985) (awarding double costs and attorney's fees under Rule 38 against counsel whose misrepresentations of the record "added grievously to the frivolous nature of this appeal"); *Paulik* v. *Rizkalla*, 796 F.2d 456, 460 (Fed. Cir. 1986) (awarding double costs for "flagrant misrepresentations of the record").

In short, the language on which petitioner and his *amicus* focus, read in the context of the surrounding sentences and other Seventh Circuit decisions, plainly does not constitute a free-standing test for identifying a frivolous appeal. To the contrary, the court of appeals' decision to assess costs on petitioner under the particular facts of this case was based on well-established criteria over which the circuits substantially agree. There is no reason to suppose that any other circuit would reach a different result on this record.

II. The Court of Appeals Acted Properly in Sanctioning Petitioner Under Rule 46(c) for Repeated Misrepresentations.

Petitioner raises two objections to the fine that the court of appeals imposed on him for repeated misrepresentations in his appeal brief. Neither objection has any merit, and both present factual issues unworthy of review by this Court.

A. Contrary to petitioner's assertion (Pet. 10-11), no conflict among the circuits arises from the court of appeals' use of Rule 11 of the Rules of Civil Procedure to help define "conduct unbecoming" a lawyer under Rule 46 of the Rules of Appellate Procedure. The Seventh Circuit, like its sister circuits, recognizes that Rule 11 sanctions are not directly applicable to appeals. Pet. App. 10a. See also *Leigh* v. *Engle*, 858 F.2d 361, 370 n.5

(7th Cir. 1988), cert. denied, 109 S. Ct. 1528 (1989) (citing *Hays* v. *Sony Corp.*, 847 F.2d 412, 419-420 (7th Cir. 1988)).

Rather, the Seventh Circuit's position, which it followed in this case, is that Rule 11's prohibition of assertions not well grounded in fact or law " 'help[s] to define conduct becoming a member of the bar' " under Rule 46. Pet. App. 10a (quoting *In re Kelly*, 808 F.2d 549, 551 (7th Cir. 1986)). Simply stated, it is unprofessional conduct for a lawyer to make substantial misrepresentations of fact or law in an appellate brief. This proposition can scarcely be doubted. See, *e.g.*, *In re Disciplinary Action Boucher*, 837 F.2d 869, 871, modified, 850 F.2d 597 (9th Cir. 1988) ("[c]ounsel's professional duty 'requires scrupulous accuracy in referring to the record' ") (quoting *Markowitz & Co.* v. *Toledo Metropolitan Housing Auth.*, 608 F.2d 699, 704 (6th Cir. 1979)); *Paulik*, 796 F.2d at 460 (flagrant misrepresentations of the record are "a gross violation of the high standards of professional conduct" required of members of the bar). *Cf. Brookhaven Landscape & Grading Co.* v. *J.F. Barton Contracting Co.*, 681 F.2d 734, 735 (11th Cir. 1982) (attorney may be censured under Rule 46 for failing to make "a complete and accurate presentation of the issue presented for review * * * and its disposition in the court below").

The courts of appeals have a strong interest in deterring such conduct. As the Ninth Circuit has explained,

> The burden of ascertaining the true state of the record would be intolerable if misrepresentation was common. The court relies on the lawyers before it to state clearly, candidly, and accurately the record as it in fact exists.

Boucher, 837 F.2d at 871. The importance of accuracy in the statements of a brief is also reflected in the Seventh Circuit's Rule 28, which requires that the Statement of Facts be a "fair summary" (Cir. R. 28(d)(1))

and that every fact stated in it be supported by a page reference to the record or appendix (Cir. R. 28(d)(2)).

This Court recently examined the parallel proscription on "conduct unbecoming a member of the bar" in Rule 46(b)[10] and concluded that the phrase "must be read in light of the 'complex code of behavior' to which attorneys are subject." *In re Snyder*, 472 U.S. 634, 644 (1985). As the Court noted (*id.* at 645):

> [I]t is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice.

"More specific guidance," the Court added, "is provided by case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct." *Ibid.* Rule 11 certainly falls within that description, and misstatements and misrepresentations are unquestionably highly "inimical to the administration of justice."[11]

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[10] Rule 46(b) governs the sanctions of suspension or disbarment, while Rule 46(c) governs "less serious" sanctions such as the fine imposed on petitioner. See *In re Snyder*, 472 U.S. 634, 643 n.5 (1985).

[11] Under *Snyder*, therefore, the standards of conduct required by Rule 46 will evolve in conformity with the professional obligations that the rule incorporates. *Snyder* refutes petitioner's contention (Pet. 11) that the courts of appeals may not enforce a new or expanded professional obligation under Rule 46 "without first obtaining a change in the Appellate Rules." Moreover, contrary to petitioner's assertion (Pet. 10-11), the requirement that lawyers refrain from making misrepresentations in their pleadings was not an innovation of the 1983 amendment to Rule 11. That amendment imposed on attorneys the responsibility to make "reasonable inquiry" into the factual and legal basis for statements made in documents filed with the court. See Notes of Advisory Committee on Rules. Condemnation of the kind of misstatements and misrepresentations in appellate briefs that occurred in this case predates the 1983 amendments. See, *e.g.*, *Markowitz & Co.*, 608 F.2d at 704.

It is hardly surprising, therefore, that none of the cases cited by petitioner holds that a court of appeals lacks authority under Rule 46 to discipline an attorney for making factual and legal misrepresentations of a kind that could also be condemned under Rule 11. In *Webster* v. *Sowders*, 846 F.2d 1032, 1039-1040 (6th Cir. 1988), for example, the court of appeals' power was not even at issue; the court simply held that because Rule 11 does not directly apply to appeals, the *district court* could not impose Rule 11 sanctions for a frivolous appeal. Likewise, *Braley* v. *Campbell*, 832 F.2d 1504, 1510 n.4 (10th Cir. 1987) (en banc), merely states in dictum that Rule 11 authorizes sanctions only "at the trial court level."

Because there is no question that a court of appeals may discipline an attorney for significant misrepresentations of fact or law, there remains only the fact-bound question whether this $1,000 fine—which was moderate in amount and well within the normal range—was warranted.[12] Considering the number and seriousness of petitioner's misstatements, there is no reason for this Court to expend its limited resources to review that question.

As the court of appeals noted (Pet. App. 11a), the "most egregious" misrepresentation in petitioner's brief was the claim in the Statement of Facts (Appellant's Br. 3) that the union "has been cited by this court [the Seventh Circuit] for its disgraceful hiring and employment record." Even under the most expansive reading, nothing in the Seventh Circuit opinion cited by petitioner remotely implies that the court disapproved of the union's practices, let alone that it formally "cited" the union for those practices. See Pet. App. 11a n.4. Offered the op-

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[12] Indeed, the entire amount that petitioner was required to pay —the appellees' costs plus $1,000—could have been assessed against him solely under Rule 38, which authorizes an award of "just damages and single or double costs to the appellee." See also cases cited at pp. 14-15, *supra*.

portunity at oral argument to explain his serious charge against the union, petitioner merely asserted—despite the obvious import of his language—that he never meant to suggest that the court of appeals had condemned the union. Given petitioner's failure to offer any justification, the court of appeals rightly regarded his falsehood as worthy of censure. As the court of appeals put it (Pet. App. 11a), there is "no better example of a pleading not well grounded in fact or law than a brief that falsely imputes a particular position to this court."

As the court of appeals also noted (Pet. App. 11a), this was not petitioner's only significant misrepresentation. In addition, petitioner's brief contained the following errors:

> (1) Petitioner asserted (Appellant's Br. 3) that "[n]o one disputes that both the union and the Sun-Times have a dismal record" of minority hiring—although both parties had vigorously defended their hiring records.
>
> (2) Petitioner asserted (Appellant's Br. 5) that Lylbum French "was later fired after filing a race discrimination charge," which plainly suggests a retaliatory discharge by the Sun-Times. That assertion was highly misleading.[13]
>
> (3) Petitioner represented that the district court had "held that Plaintiff presented a *prima facie* case" (Appellant's Br. 10-11)—when the court had actually said that "[w]hile it seems that plaintiff may have *failed* to present a prima facie case, the court will

[13] Petitioner now insists (Pet. 8 n.2) that he really meant to say that French had been fired by the Sun-Times after filing a race discrimination charge *against the union*. But that is not what his brief said, and that is not how the court of appeals reasonably interpreted his representation. See Pet. App. 11a. Rather, the conveniently vague sentence in the brief strongly suggested that the party that fired French—which could only have been the Sun-Times—was the party against which French had earlier filed a discrimination charge.

assume for purposes of analysis that plaintiff has met his burden" (Pet. App. 20a (emphasis added)).

(4) Petitioner badly distorted the district court's reason for disregarding Myers' and French's statements concerning the requirement of lift truck experience. Petitioner asserted that the court had held their statements irrelevant "because their knowledge was based on service under a prior supervisor" (Appellant's Br. 13), thus omitting the court's additional reason that they had been hired "prior to [the] 1984 Sun-Times rule requiring full-timers to have lift truck experience" (Pet. App. 21a).

In sum, petitioner's pattern of serious misrepresentations and mischaracterizations fully warranted the court of appeals' conclusion that he had engaged in "conduct unbecoming a member of the bar."

B. Petitioner's objection to the process by which Rule 46 sanctions were imposed likewise raises no issue requiring further review. Undeniably, as the court of appeals recognized (Pet. App. 13a-14a), Rule 46(c) permits disciplinary action only "after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested." The rule does not specify, however, what constitutes reasonable notice or an adequate hearing.

Petitioner completely ignores the Seventh Circuit's case law in suggesting (Pet. 11) that that court fails to provide the procedural protections that other circuits afford. In numerous recent cases, the Seventh Circuit has adhered strictly to the formalities and terminology of Rule 46(c), denominating its notice of possible sanctions an "order to show cause" and giving the attorney an opportunity to respond and to request a separate hearing. See, *e.g.*, *United States* v. *Dominguez*, 810 F.2d 128 (7th Cir. 1987) (order to show cause; no response or request for hearing); *In re Kelly*, 808 F.2d 549 (7th Cir. 1986) (show-cause order, responsive brief, and oral hearing); *United States* v. *Ford*, 806 F.2d 769, 770 (7th Cir. 1986) (order to show cause; no hearing requested); *United*

States v. *Gerrity*, 804 F.2d 1330 (7th Cir. 1986) (order to show cause; no response or request for hearing); *United States* v. *Bush*, 797 F.2d 536, 537, 538 n.2 (7th Cir. 1986) (order to show cause; no hearing requested); *El-Gharabli* v. *INS*, 796 F.2d 935, 940 n.13 (7th Cir. 1986) (order to show cause; attorney requested hearing "if there are any further questions"). There is simply no errant practice in the court of appeals that requires this Court's correction.

There also is no question that petitioner received notice of and an opportunity to respond to the union's request that the court of appeals impose sanctions for his misrepresentations. Therefore, the cases cited in the petition (Pet. 11 n.5) that implicitly or explicitly require some notice and opportunity to respond do not conflict with the court of appeals' action here. The union's brief asked for sanctions, and both appellees' briefs identified the specific misstatements here at issue. Petitioner chose in his three-page reply brief not to defend or explain *any* of his assertions (or even to acknowledge that a request for sanctions had been made), although, if any explanation were available, he could and should have offered it not only for his own sake but also in order to protect his client's case on the merits. In addition, petitioner received a face-to-face hearing at oral argument, when the panel questioned him at length concerning the veracity of his statements. Finally, petitioner had the opportunity to present his case against the sanctions in his petition for rehearing. The court of appeals read and considered his petition and later even modified its opinion (Pet. App. 13a-14a) although it found no ground to modify the sanctions themselves. At no time did petitioner ever request a separate hearing on the issue of sanctions, as Rule 46(c) expressly contemplates.

Petitioner argues (Pet. 13-14) that a request for Rule 38 sanctions does not put counsel on notice to defend his misrepresentations because the question of frivolousness is different from the question of misrepresentation.

In this case, however, the union based its request for sanctions specifically on petitioner's misrepresentation of Seventh Circuit precedent (*i.e.*, on petitioner's false statement that the court of appeals had "cited" the union for its "disgraceful" hiring practices) and on his other misstatements and unsupported allegations. Union Br. 9 n.4, 13. The law is well established that such misstatements and misrepresentations warrant sanctions under both Rules 38 and 46. See pp. 14-15, 16-18, *supra*.[14]

The provision of separate notice and a hearing under Rule 46 would have offered no additional protection in a case such as this one. Appellees' briefs identified all misrepresentations that eventually supported the Rule 46 disciplinary action. The court at oral argument gave petitioner an ample opportunity to justify or explain his conduct. In particular, the "most egregious" misstatement under Rule 46 (Pet. App. 11a), the distortion of previous Seventh Circuit precedent, was fully explored at oral argument.

The hearing that petitioner received at oral argument extended not only beyond what was necessary in this case, but beyond what parties exposed to sanctions usually receive in similar contexts. This Court, for example, rarely provides an oral hearing before assessing damages for a frivolous appeal or petition for certiorari under S. Ct. R. 49.2 (see, *e.g.*, *Hyde* v. *Van Wormer*, 474 U.S. 992 (1985); *Tatum* v. *Regents of the University of Nebraska-Lincoln*, 462 U.S. 1117 (1983)), or even before removing an attorney from the bar of the Court. See S. Ct. R. 8 (providing only for an "opportunity to show good cause, within 40 days, why disbarment should not be effectuated"). Likewise, Rule 11 motions are often decided on written submissions alone, for "[i]n many situa-

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[14] We do not comprehend petitioner's assertion that the union "did not argue that mere misrepresentations could be grounds for punishment." Pet. 13. The union's brief called for sanctions based on petitioner's "scurrilous and unsupported" distortion of Seventh Circuit precedent. Union Br. 9 n.4.

tions the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary." Fed. R. Civ. P. 11, Advisory Committee Note (1983).

This Court has often emphasized that the requirement of a "hearing," whether contained in the Due Process Clause or in other authorities, is "intensely practical," and "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved." *Goss* v. *Lopez*, 419 U.S. 565, 578, 579 (1975).[15] Because petitioner was fully apprised of the outstanding request for Rule 38 sanctions and had a full opportunity to defend the misstatements for which Rule 46 sanctions eventually were imposed, further procedural formalities would have constituted a futile gesture wasteful of the time and resources of both court and counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1989

[15] Accord *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands"); *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 239, 241 (1973) ("[t]he term 'hearing' in its legal context undoubtedly has a host of meanings," including, in that case, "evidentiary submission[s] in written form only").

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MAY 31 1989

No. 88-1756

In The Supreme Court of the United States October Term, 1988

L. STEVEN PLATT,

Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION AND BRIEF *AMICUS CURIAE* OF THE CHICAGO COUNCIL OF LAWYERS IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION AND BRIEF *AMICUS CURIAE* OF THE CHICAGO COUNCIL OF LAWYERS TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

Pursuant to Rule 36.1 of this Court, the Chicago Council of Lawyers respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for certiorari. Movant has been unable to secure the consent of one of the parties to the case in the court of appeals.

The Chicago Council of Lawyers is a bar association of some 1300 members. From its beginning, the Council has concentrated its efforts on the improvement of the judicial

process. The Council believes that the decision below is threatening to lawyers who bring meritorious appeals under the civil rights laws. The council also views the decision below as threatening its members with unfair procedures and unfair sanctions. The Council believes that its views will be helpful to the Court in emphasizing the importance of this petition, notwithstanding the small monetary amount at stake.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CHICAGO COUNCIL OF LAWYERS IN SUPPORT OF THE PETITION FOR CERTIORARI

Pursuant to Rule 36.1 of this Court, the Chicago Council of Lawyers respectfully submits this brief *amicus curiae* in support of the petition of L. Steven Platt for a writ of certiorari to the Court of Appeals for the Seventh Circuit.

INTEREST OF THE AMICUS CURIAE

The Chicago Council of Lawyers is a bar association of some 1300 members. It was founded in 1969 and holds a seat in the House of Delegates of the American Bar Association.

From its beginning, the Council has concentrated its efforts on the improvement of the judicial process. It has drawn nationwide attention for its pioneering efforts to evaluate the federal and state judiciary and to improve the functioning of the civil and criminal justice systems. In pursuit of those objectives, the Council has participated as *amicus* in a number of cases before this Court and the lower courts.

The Council takes an interest in this petition from two perspectives. First, the Council has taken an unflagging interest in assuring access to the courts by persons of modest resources, particularly persons with viable claims under the federal civil rights laws. Among other activities, the Council has sponsored a special legal assistance project, Pro Bono Advocates, which provides volunteer attorneys to persons of modest means who have civil rights and other similar claims. While the decision below threatens lawyers in all types of appeals, it is particularly threatening to lawyers who bring meritorious appeals under the civil rights laws, and it is in this kind of case that the Seventh Circuit has been particularly zealous in handing out sanctions.

Second, the Council views the decision below as threatening its members with unfair procedures and unfair sanction. Members of the Council appear with great frequency before the Seventh Circuit. The Council and its member attorneys have grown concerned in recent years at the Seventh Circuit's increasingly aggressive use of attorney sanctions, particularly its insistence on procedural short cuts that lead to ill-considered sanctions on lawyers who are given an inadequate opportunity to show the court why it is wrong.

SUMMARY OF ARGUMENT

The opinion below proclaims an utterly erroneous standard of "frivolous" appeals under F.R.Civ.P. 38. By terming "frivolous" an appeal that "restates arguments properly rejected by the district court," the Seventh Circuit threatens litigants and lawyers with sanctions for taking good-faith appeals that deserve to be taken.

Moreover, in trying to justify its denial of a hearing to petitioner before disciplining him, the opinion adopts a rationale that *delegates to litigants* the Seventh Circuit's power to institute disciplinary proceedings against lawyers under F.R.App.Proc. 46. This unprecedented holding misreads Rule 46, threatens to multiply vexatious disciplinary proceedings, threatens lawyers with unfairness, and demeans the court of appeals itself.

The Seventh Circuit has also erred in creating, for the appellate disciplinary process, an unwritten equivalent of Rule 11 of the Federal Rules of Civil Procedure. Fairness, and the appearance of fairness, preclude sanctioning a lawyer on the basis of a rule that on its face does not apply to the court in question. Moreover, Rule 11's compensatory purposes are poorly adapted to the appellate disciplinary process.

ARGUMENT

While the Council concurs in petitioner's discussion of the errors of the opinion below, this case transcends petitioner's individual plight. The Seventh Circuit has parted company with other Circuits in three crucial holdings: its alarming definition of "frivolous appeals"; its unprecedented delegation *to litigants* of the Court's power to institute disciplinary proceedings against lawyers under F.R.App.Proc. 46; and its adoption of Rule 11 of the Federal Rules of Civil Procedure as a standard for imposing discipline against lawyers in the court of appeals.

A. The Opinion Below Proclaims an Erroneous Standard of "Frivolous" Appeals That Will Chill Meritorious Appeals

An urgent reason for granting the writ is that the opinion below states a clearly erroneous definition of "frivolous" appeals that will frighten lawyers out of bringing good-faith appeals.

The opinion below holds that an argument on appeal is "frivolous" under F.R.App.Proc. 38, and therefore can serve as a predicate for sanctions, "when the appellant merely

restates arguments that the district court properly rejected." Pet. App. 8a.[1] There is absolutely nothing to be said in defense of this definition. Most unsuccessful appeals restate arguments that the district court rejected. Every day, dozens of appellate decisions decide that although the appellant has some good arguments, the district court was nonetheless right to reject them. And there is nothing wrong with "merely restating" such arguments on appeal. Appellants are supposed to restate them. They are not supposed to state arguments on appeal that were *not* considered by the district court.

This Court's recent decision in *Neitzke v. Williams*, ___ U.S. ___, 57 U.S.L.W. 4493 (May 1, 1989), shows how far the Seventh Circuit has gone astray. *Neitzke* interpreted the term "frivolous action" under the federal *in forma pauperis* statute. It held that an action was not "frivolous" merely because it failed to state a cause of action. Instead, only those claims not based on arguable legal or factual theories could be held "frivolous." The Seventh Circuit's definition in petitioner's case cannot be squared with this holding. It makes no reference to whether an appeal raised arguable theories, but depends exclusively on whether the district court was right or wrong. And there is no case for using a more lenient standard of "frivolousness" for disciplining lawyers than for judging *in forma pauperis* petitions.

The Seventh Circuit's erroneous standard puts lawyers on notice that they are at risk of personal sanctions if they fail to persuade the court of appeals that the district court was wrong. This mistaken, but highly visible, standard will inevitably scare lawyers and litigants out of taking good-faith appeals on arguable issues. Equally seriously, this mistaken standard will multiply sanctions litigation. Every appellee who persuades the Court to affirm the reasoning of the district court will be tempted by this opinion to file a post-affirmance motion branding the appeal as "frivolous" and seeking sanctions. No one, least of all the court of appeals, stands

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[1] Citations are to the appendix in the petition for *certiorari*.

to gain from the welter of sanctions litigation that will result from such motions.

B. By Misconstruing F.R.App.Proc. 46, the Opinion Below Delegates to Litigants the Crucial Decision to Initiate Disciplinary Proceedings

The opinion below has worked a revolutionary and mischievous change in disciplinary proceedings against lawyers within the Seventh Circuit. In all Circuits but the Seventh, disciplinary proceedings against a lawyer by a court of appeals are set in motion by the court itself, through the issuance of a rule to show cause. But the Seventh Circuit, through this opinion, has delegated that crucial power – the power to institute disciplinary proceedings – to *litigants.*

This result came about as follows. The Seventh Circuit based its award of sanctions on Rule 46 of the Federal Rules of Appellate Procedure. Pet. App. 8a. That rule governs admission, suspension, disbarment, and disciplinary action against lawyers who practice before the court of appeals. However, Rule 46 provides that disciplinary action against lawyers must be preceded by "reasonable notice and an opportunity to show cause to the contrary, and after hearing if requested." No such hearing was granted petitioner. To defend this denial, the Seventh Circuit's original opinion asserted that notwithstanding the unconditional language of Rule 46, "we have held that a hearing is not required when it would not assist the court in reaching its decision." Pet. App. 10a. The petition for rehearing attacked this indefensible rationale, and the Seventh Circuit's order denying rehearing rightly abandoned that rationale.

But that order then offered a substitute rationale for denying petitioner a hearing, and this substitute only made matters worse. The modified opinion asserted that (1) Rule 46's "reasonable notice" of disciplinary action had been satisfied by the footnote in appellee's brief requesting sanctions against appellant and his lawyer; and (2) after receiving this "reasonable notice," appellant's lawyer had a chance at oral argument to defend his conduct, and has not "requested" a hearing before the court. Pet. App. 13a-14a.

Thus, according to the Seventh Circuit, disciplinary proceedings under Rule 46 were formally instituted against petitioner by a request for sanctions in a footnote to an appellee's brief. The Seventh Circuit says that this footnote constituted "reasonable notice of disciplinary action and an opportunity to show cause to the contrary" under Rule 46.

This holding, improvised to replace the court's untenable original rationale, has shocked members of the Seventh Circuit bar. The rationale has no legal merit. Rule 46's "reasonable notice" means notice *from the court of appeals*, not notice from a litigant.

The effect of the Seventh Circuit's unprecedented "notice" holding is that the Court has delegated to litigants its power to initiate disciplinary proceedings. A request for sanctions in a litigant's brief now automatically sets disciplinary proceedings in motion. A lawyer in the Seventh Circuit who reads in his opponent's brief a request for sanctions now must consider disciplinary proceedings to have begun, and to be at risk of punishment by the Seventh Circuit. To protect himself or herself, the lawyer will have to request a hearing, and will have to devote a substantial portion of the brief dealing not with the client's case on the merits, but with the question of whether he or she should be disciplined.

For three reasons, this result is deplorable. First, it demeans the court of appeals. The Seventh Circuit has tossed into the laps of litigants its solemn power to institute disciplinary proceedings. Likewise, this result will demean the appellate process. Appeals on the merits of litigants' cases will routinely be accompanied by unseemly fights over whether lawyers should be disciplined.

Second, delegating to litigants the power to start disciplinary proceedings will multiply vexatious disciplinary proceedings. Litigants who are given the power to start such proceedings against an opposing litigant's lawyer are likely to take advantage of that power.

Third, delegating the institution of disciplinary proceedings to litigants is sure to compromise the fairness of those

proceedings. Litigants have no incentive to be fair to their adversary's counsel. The present case vividly shows what can happen as a result. The disciplinary procedure against petitioner (which resulted in a fine payable to the court) should have been initiated by a clear statement from the court of what he might have done wrong, made in a fashion that informed him that he faced a serious risk of discipline, and telling him what he had to do to counter the charges. Petitioner got nothing of the sort. Instead, the proceedings against him were initiated by a snarling argument in a footnote in his opponent's brief, based (as the petition for certiorari shows) on a single alleged misrepresentation. And, when the court of appeals apparently concluded that a single misstatement was not enough to warrant discipline, the court, without *any* notice to petitioner, went searching through the record for more. As a result, it ended up basing the discipline on its own misquotation of petitioner's brief. Petitioner was thereby socked with a fine for an alleged offense he never received notice of.

C. The Seventh Circuit Erred in Grafting Rule 11 onto the Appellate Disciplinary Process

As the petition for *certiorari* points out, the decision below aggravates an existing split among the Circuits as to whether Rule 11 of the Federal Rules of Civil Procedure applies to papers filed in the courts of appeals. See petition at 9-10. *Amicus* believes that the Seventh Circuit's approach — which decrees that conduct violating Rule 11 is "conduct unbecoming a member of the bar" under F.R.App.Proc. 46 — is unwarranted and unwise.

First, it *looks* unfair to discipline lawyers for violation of a rule that on its face does not apply to the court in question. The Seventh Circuit underrates the importance of preserving the appearance of fairness in its dealings with lawyers. (This attitude has been reflected in other aspects of the Seventh Circuit's recent decisions on sanctions: for example, in its assertion that it can dispense with Rule 46's mandatory hearing requirement if it does not feel that a hearing would "be helpful to the Court" (see *Hill v. Norfolk & Western Ry.*

Co., 814 F.2d 1192 (7th Cir. 1987)), and in its holding below allowing disciplinary proceedings to be initiated against a lawyer by a footnote in an appellee's brief.) The Seventh Circuit's vigilant campaign to increase the level of appellate advocacy needs to be accompanied by an equally vigilant campaign to preserve the appearance of fairness. Most lawyers think that being fined on the basis of an unwritten rule is unfair.

Second, if Rule 46 of the Federal Rules of Appellate Procedure is to be amended to provide a specific standard, it is by no means apparent that F.R.Civ.Proc. 11 is the right standard. In the opinion of *amicus*, Rule 11 is poorly tailored to the appellate disciplinary process. Rule 11 is not a disciplinary rule at all, but a rule of civil procedure designed to compensate the opposing party. F.R.App.Proc. 46, in contrast, is a disciplinary rule regulating the status of attorneys before the bar of the court of appeals. The two rules therefore serve different purposes. The standards for one are not necessarily appropriate for the other. Some conduct deserves Rule 11 compensatory sanctions but is not disciplinable; some conduct deserves discipline but not Rule 11 sanctions. (The present case furnishes an example of conduct that, even if "disciplinable," could not have justified a $1,000 compensatory award under Rule 11, because the union defendant spent no substantial sum in briefly protesting petitioner's allegedly inaccurate statement in the footnote to its brief.)

More generally, it may be unwise to set a general rule making inadvertent misstatements a basis for Rule 46 discipline. One can imagine an overwhelmingly successful appeal in which the appellant nonetheless slips and makes one untrue statement. It is far from apparent that such a mistake, which could be sanctionable in a district court under Rule 11, should be disciplined under Rule 46.

In short, there are strong arguments that Rule 46 should not be amended to include the substance of Rule 11. In the meantime, Rule 46 says nothing of Rule 11, and Rule 11 says that it applies to the *district* courts. Petitioner's fine, on the basis on an unwritten rule, therefore looks unfair, and in fact was unfair.

CONCLUSION

Amicus curiae respectfully requests that the petition for certiorari be granted and that the judgment of the court below be reversed.

Respectfully submitted,

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REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Introduction

The sole opposition filed in this Court has been submitted, not by a party below, but by lawyers representing the respondent United States Court of Appeals for the Seventh Circuit. Far from providing a basis for denying the petition, the 23-page brief crystallizes the difficulties raised by the opinion below, and itself demonstrates why this case is worthy of review.[1]

[1]The Seventh Circuit objects that the United States, rather than itself, should have been named as a respondent with respect to the $1000 fine. However, the Circuit ordered petitioner to deliver the check to its Clerk, and the Solicitor General, who was served with the petition, declined to defend the sanctions here.

(footnote continued)

The brief filed by respondent's counsel carefully reviews the record in a way that the panel itself failed to do in its opinion, and it proposes a number of reasons, most of which not only were omitted from the five-page portion of the opinion imposing sanctions, but are contrary to it, explaining why counsel believe that sanctions could properly have been imposed. In doing so, counsel implicitly concede that the standards invoked and procedures followed below were in error, but they cite other Seventh Circuit cases in which they assert that better procedures and standards have been used. However, an appellate court may not apply proper standards and procedures in some cases, but ignore them in other cases simply because the court is so confident of the result that it feels free to disregard the proper rules, or because, in the words of the Seventh Circuit in another case, the rules would not "assist the court." *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, 1201 (7th Cir. 1987). Indeed, this Court should grant certiorari for the additional reason of sending a clear message to the courts of appeals that the imposition of punitive sanctions on lawyers is a serious business, that the rules apply in all cases, and that far more care was required than petitioner received here. *See Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986) (Pratt, J.)

A recurring theme in respondent's opposition is that the question of whether petitioner should have been sanctioned is fact-bound. In the following pages we dispute respondent's contention that the Questions Presented do not warrant the Court's review, but we do agree that the ultimate question of whether Platt should have been sanctioned is fact-bound, just as any sanctions controversy ultimately turns on the facts of the attorney's conduct and of the

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Perhaps even more remarkable is the inclusion in respondent's brief of more than six pages of argument on the Rule 38 sanctions, an issue on which the Circuit concedes it is not a respondent. Opp. 8 n.6. Because the appellees below, who were awarded the sanctions, have declined to file a brief in this Court defending their victory, the Circuit's brief on this issue amounts to an amicus brief defending its right to punish lawyers for wasting its time on supposedly frivolous appeals. The Court may wish to consider summarily reversing the Rule 38 sanctions on the ground that the only true respondents have not defended their award.

underlying case. However, the very fact-bound nature of such cases, coupled with this Court's crowded docket, means that an appellate court's decision to impose sanctions is virtually unreviewable on the merits by any higher court. That, in turn, simply increases the obligation of the courts of appeals to adhere strictly to the procedures provided by F.R. App. P. Rule 46 and to due process, and to weigh sanctions issues carefully, as the court below plainly failed to do.

1. *Rule 11 Incorporation*. Respondent denies the existence of a conflict among the circuits on the question of whether Rule 11 applies to the courts of appeals through incorporation into Rule 46. Opp. 15-16, 18. It asserts that it did not rely on Rule 11, but simply used it "to help to define" the terms "conduct unbecoming a lawyer" in Rule 46. Opp. 15-16. In fact, respondent's position is directly contradicted by *Thornton v. Wahl*, 787 F.2d 1151, 1153-1154 (7th Cir. 1986), which directly relied on Rule 11 to grant appellate sanctions, and by the 1989 edition of its own Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit which, at page 35, warns counsel that "the provisions of Federal Rule of Civil Procedure 11, prohibiting groundless assertions and allowing severe penalties for non-compliance, appl[y] to all pleadings filed in the court of appeals." In any event, the distinction on which respondents' counsel rely is mere semantics, given the history of Rule 11, the addition of the 1983 amendments to Civil Rule 11 to supplement the district courts' power to discipline members of their bars, and the absence of any language similar to that in Civil Rule 11 in Appellate Rule 46.

Moreover, contrary to respondent, Opp. 18, in *Braley v. Campbell*, 832 F.2d 1504, 1510 n.4 (1987), the *en banc* Tenth Circuit refused to award sanctions under Rule 38 and 28 U.S.C. § 1927, and in the course of its opinion it considered and rejected the use of Rule 11 as an alternative basis for imposing sanctions. The Tenth Circuit's rejection of this basis for awarding fees on appeal can scarcely be dismissed as mere dictum. Additionally, the Eighth Circuit has recently expressed doubt that Rule 11 can be used in the courts of appeals, although that court ultimately rested its judgment on the fact that no sanctions would be appropriate in that case. *Steffl*

v. J.I. Case Co., 862 F.2d 692, 696-697 n.4 (1989). *See also Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 898 (D.C. Cir. 1989) (court of appeals cannot award fees under Rule 11, although, in affirming Rule 11 fees, it can remand for district court to assess fees for defending the Rule 11 fee award). Coupled with the view of the Sixth Circuit in *Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988), which followed *Braley*, and contrasted with the support given for the Seventh Circuit's view by the Ninth Circuit in *In re Boucher*, 837 F.2d 869, 871 (1988), these cases establish sufficient disagreement among the courts of appeals about the applicability of Rule 11 to appellate procedures, to warrant review by this Court.[2]

2. *The Required Procedures*. Respondent cites several cases, all issued at least a year before the decision below, in which a panel of the Seventh Circuit provided the proper form of notice and opportunity to respond which Rule 46 requires, and it urges that review be denied because there is "no errant practice" below. Opp. 20-21. However, the panel in this case has now plainly held that such notice is not required, a holding that its counsel concede puts the Seventh Circuit at odds not only with its fellow circuits, but also with Rule 46.

But the "formalities and terminology of Rule 46," Opp. 20, do not exist merely for the convenience of the courts, to be employed or disregarded as the members of a particular panel see fit. Moreover, despite respondent's assertion that its practices are

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[2]Respondent's lawyers try to excuse their client's misquotation of petitioner's brief below in the portion of its ruling imposing sanctions on petitioner for his miscitation of the record and of other opinions, Pet. 8 n.2, by stating that the court "reasonably interpreted" the brief to imply the words that the panel placed in quotation marks. Opp. 19 n.13. They then root through the record to find two additional examples of allegedly sanctionable phrases from petitioner's brief. Opp. 19-20, ¶¶ 3 and 4. However, counsel cannot alter what respondent said by giving their interpretation of it. Moreover, these additional items were not mentioned in the opinion below as a reason to impose sanctions. Nor were they discussed at the oral argument that, respondent now asserts, was Platt's notice and opportunity to respond. Accordingly, neither of these defenses can be relied on here.

generally proper, the fact is that numerous commentators do not share this benign view, and have singled out for criticism the Seventh Circuit's cavalier attitude toward due process in the sanctions process. *E.g.*, Third Circuit Task Force, *Rule 11 in Transition* 31 (1989); Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925, 1958-1962 (1989) (copies of the page proofs of this article have been lodged with the Clerk); *see also* Willging, *The Rule 11 Sanctioning Process* 89-90 (Federal Judicial Center 1988).[3]

Perhaps even more frightening than the opinion itself are the alternate forms of notice that respondent claims are adequate in the Seventh Circuit. According to the Opposition, at 21, the opportunity to file a petition for rehearing, after the court has already published a final decision awarding sanctions, provides adequate due process protection. *See also Brown v. National Bd. of Med. Exam.*, 800 F.2d 168, 173 (7th Cir. 1986). However, most precedent requires *prior* due process, before three members of the court have made up their minds. *E.g.*, *Tom Growney Equip. v. Shelley Irrig. Devel.*, 834 F.2d 833, 837 (9th Cir. 1987) (Rule 11); *Textor v. Board of Regents*, 711 F.2d 1387, 1395-1396 (7th Cir. 1983), *see also* Third Circuit Task Force, *Rule 11 in Transition* 29, 32-34 (1989) (citing several circuits); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (pre-deprivation hearing is required unless quick action is needed or pre-deprivation process is impractical). Therefore, the contention that rehearing satisfies Rule 46 and due process creates another conflict and further justifies granting certiorari.

Finally, respondent relies on the fact that both opposing briefs accused petitioner of misstating the record and the law, which, its counsel assert, was enough to put him on notice of the possibility

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[3]This attitude toward the procedural rights of attorneys facing sanctions is also shown by the fact that the Seventh Circuit routinely erased the tape of the oral argument that its amended opinion describes as Platt's chance at due process. The tape is available for this Court's review only because Platt happened to buy a copy of the original before it was destroyed. *See* the addendum to this brief (letter from respondent's counsel describing the circumstances).

of Rule 46 discipline. That approach, we suggest, is positively terrifying because appellate briefs routinely challenge the other side's characterization of the law and the facts, sometimes in very strong terms. A Rule 46 notice to show cause is issued only after the court has made some threshold determination that sanctions may be appropriate, and thus warns the lawyer named in the notice that a brief must be filed defending his conduct. But a party that hopes to distract its adversary's attention from the merits has no incentive to decide whether a misrepresentation ought to be punished, as opposed to being simply disregarded, before objecting to a characterization of the record or the law. If every claim that a lawyer misstated the record were to become the equivalent of a notice from the court that sanctions were in the air, that would significantly raise the stakes in virtually every appeal to include the question of whether opposing counsel ought to be punished, thus making appellate practice as unpleasant and personal as much district court litigation has already become.[4]

3. *Rule 38 Test.*-Respondent defends its award of sanctions under Rule 38 by insisting that it applies a two part test, first requiring a finding that the result be obvious or the argument clearly be without merit, and second that the appeal have been pressed with no reasonable expectation of success and "for purposes of delay or harassment or sheer obstinacy"; respondent cites a number of its own decisions and the decisions of other courts to show an alleged consensus on this formulation. Opp. 9-10. Petitioner's quarrel is not with respondent's formulation, but with the fact that the opinion below found both factors to be satisfied *solely* because, accor-

[4]The solution to this problem posed by respondent's counsel is to impose Rule 38 sanctions on appellees who file frivolous motions for sanctions. Opp. 11, *citing* Seventh Circuit cases. We leave for another day the question of how Rule 38, which provides for sanctions for frivolous *appeals*, authorizes the imposition of sanctions on persons for filing frivolous motions for damages under Rule 38. However, the apparent ease with which such counter-deterrents are created in the Seventh Circuit provides further reason for concern that, in the Seventh Circuit, "where there's a will to impose sanctions there's a way," even if no rule grants the necessary authority.

ding to the panel, petitioner had repeated arguments that the district court had found wanting. Pet. App. 8a, 9a. Indeed, there was no evidence whatsoever bearing on any of the motives that petitioner had in filing the appeal, let alone that his purpose was for delay; after all, what did he hope to delay, and what could a lawyer handling a contingent fee case hope to gain by filing a frivolous appeal? As a result, the application of an alleged second factor appears to add nothing to the "repetition" factor that respondent essentially concedes is far too strict to be sustained on its own.

Respondent's counsel now place much emphasis on petitioner's alleged failure to address the reasoning of the district court in his brief below and on his alleged misrepresentations of the evidence in support of the finding that the appeal was frivolous. Opp. 12-13. If these characterizations of petitioner's briefs below were accurate, they might bear on whether the appeal was without any basis. However, respondent's opinion did not rely on either alleged fault, but rather rested solely on the claim that petitioner had simply repeated his arguments made in the district court, despite the fact that petitioner repeatedly criticized the district court's reasoning. *See* Brief for Appellant at 7 ¶ 2, 9 ¶¶ 2 and 3, 10 ¶¶ 2 and 3, 11 ¶ 2, 12 ¶ 1, 13 ¶¶ 2 and 3, 14 ¶ 1, 15 ¶ 1 and 2, 16 ¶ 1 (respondent has lodged copies of the briefs below with the Clerk). Although the court below obviously rejected these attacks on the district court's opinion, respondent's counsel are simply wrong in contending that petitioner's arguments below ignored the district court's opinion.

4. *The Big Chill*. Had the court of appeals filed its counsel's opposition to this petition as its opinion imposing sanctions, petitioner would have had a more difficult case, because, although the sanctions would still be erroneous, it would be less clear that significant questions were presented concerning the standards and procedures that apply to appellate sanctions. However, it is the Seventh Circuit's opinion, not its brief, that has precedential effect, and other attorneys who read the opinion below and the other cases we cited in our petition will be severely chilled by the Seventh Circuit's crusade to discipline lawyers appearing before it, particularly when

representing plaintiffs in unpopular cases such as civil rights suits. Indeed, the *amicus* Chicago Council of Lawyers plainly says that its members have already been chilled.

In our adversary system, lawyers play a vital role in providing access to justice for all Americans, a role that is in many ways unique in the world. The Court should grant review in this case not simply to correct the particular errors in the decision below, which we believe are many, but to emphasize that before punishing lawyers for alleged misconduct in litigation, the courts themselves must proceed in a manner that is beyond reproach, adhering strictly to the Rules of Civil and Appellate Procedure that have been adopted by this Court and subjected to scrutiny by Congress. If those Rules are to be changed, that must be done by using the procedures provided by law for securing amendments, not by judicial fiat.

Respectfully submitted,

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September 1989

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JAMES D. HOLZHAUER
MEMBER OF THE DISTRICT OF COLUMBIA BAR

August 8, 1989

Paul Allan Levy
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Re: *Platt* v. *United States Court of Appeals*

Dear Paul:

As I mentioned on the telephone this afternoon, we will be representing the Seventh Circuit in this matter. The clerk has informed us that the audio tape of the oral argument has been erased. He explained that the tapes are routinely re-used after the Court issues its mandate.

I would be most appreciative if you would send me a copy of the recording you made from the Court's tape. I am sure the Court will gladly reimburse you for any reasonable costs you incur.

Sincerely,

/s/ Jim
James D. Holzhauer

JDH:cml